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CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.
OCTOBER TERM, 1906.

WILLIAM J. MAGIE, CHANCELLOR.

HENRY C. PITNEY, JOHN R. EMERY, FREDERIC W.
STEVENS, MARTIN P. GREY, EUGENE STEVENSON,
JAMES J. BERGEN AND LINDLEY M.
GARRISON, VICE-CHANCELLORS.

MALVINA V. DAWSON

v.

SIEGFRIED LESCHZINER et al.

[Decided January 15th, 1907.]

1. A bill disclosed that complainant employed defendants as real estate brokers to procure a purchaser for lands which complainant desired to sell; that defendants procured a purchaser who was willing to give

Dawson v. Leschziner.

72 Eq.

\$5,500 therefor; that defendants did not disclose to complainant the sum the purchaser was willing to give, but assured complainant that \$5,062 was the best price they could obtain, and thereupon complainant contracted to, and did, convey her land to the purchaser, and received therefor only \$5,062 of the \$5,500 paid to defendants.—*Held*, that the bill praying for an accounting and a decree for the excess paid to defendants over the amount received by complainant is not demurrable on the ground that complainant has a complete remedy at law.

2. Whether complainant has a complete remedy at law may be doubtful, but if she has, equity will maintain jurisdiction to grant appropriate relief because of the fraud disclosed.

On demurrer to bill.

Mr. Samuel F. Leber, for the demurrants.

Mr. Henry H. Dawson, *contra*.

MAGIE, CHANCELLOR.

The bill demurred to presents the following facts: Complainant was the owner of real estate in the city of Newark, and employed the defendants, who were at that time partners conducting a real estate business in Newark, to sell her property at the price of \$5,500. The defendants notified complainant that they had an offer of \$5,000 for the property, and advised her to accept it. Thereafter, the complainant agreed to sell her property for \$5,062, which she was assured by the defendants was the best price they could obtain for it, and she signed an agreement to convey the property to Hugo Sutor for \$5,062. Afterward complainant, with her husband, executed and delivered a deed for the property to Hugo Sutor for \$5,062, for which price the complainant received a bond and mortgage for \$4,000, and the balance of the purchase price in cash, less the brokerage charged by the defendants. Since that time complainant has discovered that Sutor, instead of paying to defendants for complainant \$5,062 for the property, really paid them \$5,500; that Sutor had previously told the defendants that he would pay \$5,500 for the property before complainant signed the agreement to sell for \$5,062, which fact was fraudulently concealed from complainant by the defendants. Defendants, instead of

2 Buch.Dawson v. Leschziner.

accounting to complainant for \$5,500, the amount received by them, only accounted to her for \$5,062.

Upon these statements the complainant prayed for an accounting, and a decree directing the defendants to pay to the complainant \$438, less two and one-half per cent. commission.

The defendants present several grounds of demurrer. The first, and the one principally argued, is that the complainant has adequate relief at law and may there recover the amount which she now seeks to have decreed to be paid to her.

This court has a general jurisdiction in cases of fraud, as well in cases where the remedy at law is plainly adequate and complete, as in other cases. But when the remedy at law is plainly adequate and complete, the court of chancery is reluctant to exercise its jurisdiction, and will not do so unless the administration of justice will be thereby plainly facilitated. *Eggers v. Anderson*, 63 N. J. Eq. (18 Dick.) 264.

It may perhaps be questioned whether the complainant has a complete and adequate remedy by a resort to an action at law. The case differs from that of *Krueger v. Armitage*, 58 N. J. Eq. (13 Dick.) 357, and from *Polhemus v. Holland Trust Co.*, 59 N. J. Eq. (14 Dick.) 93, and 61 N. J. Eq. (16 Dick.) 654.

In each of the cases last stated the defendants had procured from the complainants money of the complainants by false and fraudulent representations, so that the complainants' right to the money could be considered to be unaffected by the fraudulent transaction. In the case now before us, the defendants have received from a third party money which in equity ought to go to the complainant. In an action at law to recover that money the complainant would be met with a defence founded upon her written agreement to convey the property for the sum of \$5,062, and with the fact that she had afterward executed and delivered a deed for the property to the purchaser at that price. So that without deciding that no action at law would lie, it at least is not clear that that action would be complete and adequate to relieve the complainant.

In the case made by the bill the real estate agents employed to sell have concealed from the complainant facts which they were bound to make known to her, viz., that the purchaser they

had procured for the property was willing and ready to give \$5,500 for it. In the case of *Young v. Hughes*, 32 N. J. Eq. (5 Stew.) 372, the relation of a real estate broker with his principal was under consideration in the court of errors and appeals, and it was adjudged that the broker so employed became an agent with a fiduciary relation which required of him fidelity and good faith toward his employer within the sphere of his employment. Among other things, it was declared that the broker was bound to disclose to his principal all facts within his knowledge which might be material to the matter in which he was employed. In that case the concealment of facts was held to justify the court of chancery in refusing to enforce a contract of sale made by the procurement of a broker who was guilty of concealment with the connivance of the purchaser.

The case here presented discloses a fraud by a fiduciary agent upon his principal, and considering the fact that it may be doubtful whether the principal may be relieved in a court of law, the court of chancery should maintain its jurisdiction to enforce proper relief.

The bill is not objectionable on that ground.

It is secondly objected that the complainant has been guilty of laches. The sale of the property took place in June, 1904. The fraud was not discovered until December, 1904, and this bill was filed in April, 1906. It is not perceivable that this delay in seeking relief is laches, for which the bill should be dismissed.

It is thirdly presented as a ground for demurrer that no jurisdictional facts have been stated supporting the decree sought in this bill. The statements above made dispose of this objection. The bill sufficiently states a jurisdiction in the court and adequate relief may be here granted.

The demurrer must be overruled.

2 Buch.Smith v. Smith.

ALFRED R. SMITH

v.

LAURA SMITH.

[Decided February 16th, 1907.]

1. Evidence in a suit for divorce considered, and *held* not to sustain the master's finding of willful, continued and obstinate desertion.

2. A wife was shown to have frequently left her husband, but to have always returned to him upon his request. Her leaving him, which was claimed to be desertion, was proved, but he made no request for her return thereafter. A letter, claimed to have been received by him from her, might have excused him for not seeking her return, but the receipt of the letter was only proved by his uncorroborated evidence.—*Held*, that a report that her desertion was willful and obstinate was not supported by evidence.

On application by petitioner for an order to take additional testimony.

Mr. Royal P. Tuller, for the petitioner.

MAGIE, CHANCELLOR.

The evidence before the master shows that for more than two years before the filing of this petition the parties were separated, and that the separation commenced by the defendant leaving the matrimonial domicile. The master has reported that willful, continued and obstinate desertion has been made out.

Whether the report in favor of a divorce is supported depends upon whether the desertion by the wife was, under the circumstances, willful. The evidence shows that she had frequently before left the petitioner, and remained away from him for times of various lengths. It also shows that on every former occasion she yielded to his requests and persuasions and returned to him.

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I find nothing in the case to indicate that petitioner should not have again approached the defendant with similar requests and persuasions, unless it be a letter which he declares he found under his plate on the breakfast table on the morning defendant left him. If that letter were really received by him from the defendant in the manner described, I think it fairly indicates such an intent on the part of defendant as would excuse petitioner from again persuading her to return. But the genuineness of the letter, and the description of the manner in which petitioner received it, are proved only by the evidence of petitioner, of which I am unable to find the least corroboration. The letter, therefore, cannot affect the conclusion to be reached upon this evidence.

Leaving the letter aside, I think the petitioner should have again sought to persuade his wife to return to him. If he had done so in a proper manner, and she had refused, her desertion at the time named would have been shown to be willful. As the proofs thus fail, I think the master's report cannot be confirmed.

In anticipation of this conclusion, counsel have applied for an order opening the case and permitting the master to take additional testimony. In accordance with views previously expressed in other cases, I am unwilling to open a divorce case to permit the additional evidence necessary to obtain a decree to be proved by means which the party and his counsel had in their possession and under their control and failed to make use of. The necessity of corroborating the evidence of the petitioner respecting the letter was, or ought to have been, in the mind of counsel who took this testimony, who was not the counsel now applying for decree.

The application must be denied and the petition dismissed.

2 *Buch.* Northeastern Telephone and Telegraph Co. v. Hepburn.

THE NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY

v.

HENRY HEPBURN.

THE NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY

v.

DANIEL HEPBURN.

THE NORTHEASTERN TELEPHONE AND TELEGRAPH COMPANY

v.

ROBERT HEPBURN.

[Decided December 26th, 1906.]

1. The right of a corporation to take and hold title to an interest in real estate cannot be denied by the grantor, but can only be contested by the public authorities.

2. The grant of a right to maintain a telephone line over certain premises conferred on the grantee the right to construct a single line of poles, and to place thereon any number of cross-arms and wires.

3. A deed to a water company granted a right of way over the grantor's land for the laying of water pipes within a space not exceeding ninety-nine feet wide, "with the right to set up, operate and maintain a telegraph or telephone line or lines thereon, and with the right of ingress and egress to and from said right of way for all purposes."—*Held*, that such grant did not confine the water company to a telegraph or telephone line used exclusively for the purposes of its water works plant, but entitled a telephone company, under an assignment from the water company, to use such right of way for the maintenance of a commercial telephone line.

4. Where defendants granted a right of way for the maintenance of a telephone line to complainant's assignor, and thereafter defendants contended that complainant company had increased the burden of the easement beyond the scope of the original grant, and thereupon entered and

Northeastern Telephone and Telegraph Co. v. Hepburn. 72 Eq.

cut down certain of the wires from the poles, &c., complainant was not required to establish its right to maintain its line in the condition that existed before defendants' acts complained of in order to entitle complainant to an injunction restraining further interference with its wires.

5. Where a deed to a right of way for a telephone line was unambiguous, parol evidence was inadmissible to limit it to a grant for the maintenance of a non-commercial line.

6. Where plaintiff was a *bona fide* assignee of a right of way for the maintenance of a telephone line, it was not bound by an alleged oral agreement between the original parties to the deed conveying such right of way that the line should be used only for the benefit of the grantee in connection with its water works plant.

Three causes tried together. On final hearing on bill, answer and proofs.

Mr. Gilbert Collins, for the complainant.

Mr. Adrian Riker, for the defendants.

PITNEY, V. C.

The object of these bills is to protect the complainant in the enjoyment of an easement in land by enjoining the disturbance thereof by the defendants. The easement was created by the predecessors in title of the several defendants in the three causes (which were tried together) by grant made to the predecessor in title of the complainant. The grant was for the right to set up, operate and maintain "a telegraph or telephone line or lines" over certain lands, and a telephone line was at once erected and has ever since been maintained.

The complainant and its predecessors in title have been in the possession and enjoyment of this easement for several years, and their right to do so has never been and is not now seriously contested by the several defendants.

The defendants justify their action complained of by complainant, which consisted of cutting down certain of the wires, &c., on the arms of the poles constituting the telephone line, on the ground that the complainant is increasing the burden of the easement beyond the scope of the original grant.

2 Buck. Northeastern Telephone and Telegraph Co. v. Hepburn.

That I conceive to be the question involved in these causes, and its solution depends upon the true construction of the terms of the grant. It was made by the predecessors in title of the defendants to the East Jersey Water Company, and by it assigned in part to the city of Newark.

One point made by the defendants may be dealt with at the start. They contend that the East Jersey Water Company had no power to take and accept a grant of a right to maintain a telephone or telegraph system. The answer to this objection is simply that it does not lie in the mouth of the grantor of real estate or an interest in real estate to set up that the grantee was incapable of receiving and accepting the title or right so conveyed. Only the public authorities can take advantage of that disability. The authorities on that question are abundant and are collected and collated by Justice Harlan in *Fritts v. Palmer*, 132 U. S. 282 (at p. 291 *et seq.*).

Coming now to the grant itself, the language is this, as found in the deed from Henry Hepburn and wife to the East Jersey Water Company, dated July 3d, 1891, the grantors

"do hereby grant and convey to the East Jersey Water Company, * * * its successors and assigns, the right of way over, through and across the lands hereinafter described, situate * * * in and upon which to lay, operate and maintain a water pipe or water pipes for the transportation of water to the city of Newark, in said state, and other places; such pipe or pipes to be laid within a space not exceeding the width (99 feet) particularly described in the description hereinafter set forth, *with the right to set up, operate and maintain a telegraph or telephone line or lines thereon*, and with right of ingress and egress to and from said right of way for all purposes."

Then follows a description of the right of way ninety-nine feet wide.

After the *habendum* clause, which follows the description, we find this language:

"The possession and use of the said premises are to be and remain in the said grantors, their heirs, executors, administrators and assigns, subject to the grant herein made, as fully as if this conveyance had not been executed."

Northeastern Telephone and Telegraph Co. v. Hepburn. 72 Eq.

This language is the same in each of the conveyances of the predecessors in title of the defendants, and was probably found in a printed form used by the East Jersey Water Company in acquiring a right of way for their works from the northern portion of Morris and Passaic counties to the city of Newark and elsewhere.

That company assigned to the city of Newark its rights in this right of way by a deed dated May 2d, 1892, which recites an agreement of September 24th, 1889, and then conveys to the city all the works in the meantime erected by the water company,

"with all and singular their appurtenances, adjuncts and appliances of whatever nature, kind or description soever. * * * And also all and every the lands and rights of way over which the conduit or conduits, pipe line or lines, have been laid or constructed, and all and singular the lands and rights of way acquired. * * * Together with all and singular the ways, profits, privileges and advantages," &c.,

with a corresponding *habendum*.

This deed seems to be ample to convey every sort of right which the water company acquired by the conveyances from the defendants.

Later on, however, in 1900, another agreement was made between the water company and the city by which the water company expressly conveyed to the city its right, title and interest in the existing telephone line here in question, with an exception or reservation to the water company of the right to maintain two telephone or telegraph wires upon the poles conveyed, and a joint agreement for the maintenance of the poles.

This right was later on assigned by the city of Newark to the complainant by deed dated August 24th, 1905. That assignment is special and reserves certain rights in the city, or rather, in consideration of the conveyance, the complainant herein agreed to perform certain services for the city.

Shortly after this arrangement the complainant entered upon the right of way and replaced the telephone poles already in existence with larger poles and placed upon them larger arms and prepared to string upon them a greater number of wires, but did not increase the number of poles. The sole increase of

2 Buch. Northeastern Telephone and Telegraph Co. v. Hepburn.

the burden of the easement was a subsequent increase in the number of wires strung on the poles.

As soon as this increase was made the defendants entered on the right of way and cut off all the wires, *manu forti*. Subsequently they restored two wires, being the number in use before the increase. Upon *ex parte* application to this court an injunction was granted and under its protection the cut wires were restored.

It is not easily perceived how the adding of additional wires, and, if you will, arms on the poles, increases perceptibly the burden of the easement. The language of Mr. Justice Dixon, in *Slingerland v. Newark*, 54 N. J. Law (25 Vr.) (at p. 69), is significant in this connection. "Under these circumstances it is not apparent how the prosecutor can have any legal concern with the quantity of water drawn through the aqueduct, or with the use made of so much of it as the public does not need." In fact the circumstances show that the right and interest of the owners of the fee in the soil is of little practical value. It resembles the ownership of the soil of a railway strip subject to the easement of the railroad.

The East Jersey Water Company conveyed to the city of Newark the right of way for pipes and telephone lines over only a part of the whole strip twenty-four feet in width. The water company reserved to itself the right to lay pipes for its own use on the rest of the strip.

The city has and maintains two large parallel mains beside its line of telephone poles. Besides these easements is the general right of way from end to end of the whole strip, which is naturally and necessarily in constant use, and must be nearly or quite exclusive in its character.

But the complainant itself has encouraged the defendants in the notion that the additional use to be made by it of this telephone line over and above that which the city previously used has some pecuniary value by providing, by a sort of stipulation in its contract of assignment with the city, that it would attempt to acquire from all the owners of the fee along the miles of the pipe line the right to make this additional burden on the land.

This right it did acquire, on what was to it satisfactory terms, from all the other owners of the fee, but was unable to agree with the defendants.

This conduct on the part of the complainant ought not, and will not, prejudice its right to the relief it asks in this court if such right is clear under its contract.

The defendants assert that it is not clear. Their counsel does not argue that the grant is not in terms very broad and general, and I have already expressed the opinion that they cannot take advantage of the circumstance that the water company was not capable, under its charter, to enter into the business of carrying on a telephone line for public purposes, but their counsel relies on a single word in the grant, taken in connection with the circumstances, to manifest an intention on the part of the grantors to confine the use of the telephone line to a use in connection with and as an adjunct to the beneficial use of the great water works the water company was about to construct.

The word relied upon is the single word "with," which follows the grant of the right to lay, operate and maintain a water pipe or water pipes over the land in question, and precedes the words "the right to set up, operate and maintain a telegraph or telephone line or lines" on the land.

But two matters must be taken into account in considering the force of the word "with." First, the grant is a right to maintain a line or lines, leaving the number unlimited. Now, it is quite clear and undisputed that by a line of telegraph or telephone poles is meant a line of poles carrying an unlimited number of wires, and that such a line is not rendered plural in its nature by having more than one wire stretched upon it. It still remains a single line, hence the use of the plural in the grant is significant. And the question arises, How could it be supposed that the water company could ever need more than one line of poles for its use in connection with the water works? The other matter is that the grant of the right to maintain telephone and telegraph line or lines is followed in the same part of the sentence with a grant of ingress and egress to and from the right of way "for all purposes."

2 Buch. *Northeastern Telephone and Telegraph Co. v. Hepburn.*

Now, it seems to me that the words "for all purposes" cannot be entirely ignored, although its immediate connection is with a grant of a right of way.

Moreover, it seems to me that if the parties had intended to limit the right to maintain the telegraph and telephone poles to a use strictly in aid of the original construction and subsequent maintenance and operation of the great water works they would have said so.

The fact is that the burden of the telephone and telegraph line of poles is not affected or increased or varied by the number of messages sent over the wires, and hence there was no occasion to make any provision on this subject.

If the defendants' contention in this behalf is sound, then it follows that it is not within the right of the water company or its assignee, the city, or the complainant, as the assignee of the latter, to send a single message from the city of Newark over the line to Newfoundland which does not relate to the business of the water-supply, and, according to the practice here adopted by the defendants and contended for by counsel, the sending of such a message would authorize the defendants to enter and, *manu forti*, destroy the wires.

The contention of the defendants is, as before stated, that the use of the word "with" in the grant confines the use of the telephone line to purposes strictly adjunct to and in aid of the grant of the right to lay water pipes, which was for the "transportation of water to the city of Newark, in said state, and other places." For this contention counsel relies upon three adjudged cases, which I will now refer to.

The first is *Leeke v. Bennett*, 1 Atk. 470, a decision by Lord Hardwicke, which arose out of the construction of a clause in a will as follows: "I give to my niece, Elizabeth Martin, during the time of her natural life, my house on Mays Hill, in Greenwich, with all the household goods that shall be found therein at the time of my decease."

The estate of the testator in the house was a term of years with only ten years unexpired. The question was whether the gift to the niece of the household goods was for life or in fee,

and it was held that the word "with" so connected the household goods with the house as that the estate in those was limited in the same manner as that in the house. The lord-chancellor relied upon the fact that the words "during her natural life" preceded the gift of the house, and remarked: "If the words 'during her natural life' had been subjoined to the devise of the house it had not been so clear a case, though I think that would not have varied the law of the case, * * * but those words, being put before the devise, must operate equally on both parts of the subsequent devise, and the same interest passed in both. The word 'with' would have had the same effect and been considered in the same manner in the case of a grant."

Here it is to be observed that the use of the house and the use of the goods consisted in substantially the same act or series of acts; unless they were separated one could not be used without the other, and the circumstances that they were not separated made the subject of the devise in effect a single one of the house and furniture. This circumstance differentiates that case from the present one.

Here there was no necessary or even natural unit of use between the water pipes for carrying water from Newfoundland to Newark and the telephone line; either could be used, and were, in fact, used without the other. There was nothing common in the mode of use. The telephone line was simply a convenience, and although used as a convenience, not as a necessity, in maintaining and operating the water pipes, the actual use of each was quite distinct and dissimilar.

The next case cited is *Richards v. Baker et als.*, 2 Atk. 321. That also was the construction of a will. There the testator gave his widow £2,000, to be paid in six months after his decease, and then proceeds:

"I do also give and bequeath to my dear and loving wife all my household goods, furniture, plate, linen and china in my house at Edmonton, wherein I now dwell, or to the said house belonging, and also the said house, gardens, fields and lands thereto belonging, so long as she continues my widow, and no longer; and I likewise give her my jewels, coach, chariot and coach horses."

2 *Buch.* *Northeastern Telephone and Telegraph Co. v. Hepburn.*

The master of the rolls decreed the widow to leave with the master a schedule of all the several things specifically bequeathed to her during widowhood, which was the usual mode of limiting her right to a life estate. The matter came on before the lord-chancellor on appeal, and he said that he had to determine what is the relation and extent of the words of limitation "so long as she continued a widow, and no longer;" whether they are to be confined to the house at Edmonton or to be extended to the whole; and he held that it was to be confined simply to the house and the household goods, and did not include the jewels, coach, chariot and coach horses. Careful consideration of that case seems to me to make against the defendants rather than in their favor, for the gift of the jewels, &c., was connected with the other gift by the word "likewise," which means "in like manner," and might well be construed to mean "to the same extent." But the lord-chancellor held otherwise.

These two decisions by Lord Hardwicke illustrate the true distinction to be applied in such cases. In the one case the natural and necessary use of the furniture with the house made the two a single subject of the gift, while in the other case the jewelry, coach, chariot and horses, though convenient, were in no sense necessary to the use of the house, and their use was entirely distinct from it. The present case falls under the latter category. Water works like those erected by the East Jersey Water Company had been erected and maintained many years before the invention and use of telegraphs and telephones.

The next case cited by defendants is *Durham and Sunderland Railway Co. v. Walker*, 2 *Adolph. & E. (N. S.) Q. B.* 940, also reported in 2 *Gale & D.* 326; 11 *L. J. Exch.* 442. In that case the court of exchequer chamber had before it on bill of exceptions and writ of error a construction put by Justice Coltman at *nisi prius* on a reservation out of a lease granted for years by the dean and chapter of the city of Durham to one Walker of a right in certain lands. Under that reservation the lessors had granted to the defendant the right to build an ordinary double-track railway for through traffic, and an action at law had been brought by the tenant for years against the persons acting under the grant. The reservation was of

"woods, trees, mines, quarries and seams of clay, and *with* full and free authority and power to cut down, carry away, * * * said woods and trees, and to dig and carry away the mines, quarries, * * * *with* free ingress, egress and regress, way, leave and passage to and from the same or to or from any other mines, quarries, * * * *with* carts and all manner of carriages, and also all necessary and convenient ways, passages, * * * for the purposes aforesaid, and *particularly* laying, making and granting wagonway or wagonways in or over the premises or any part thereof, paying reasonable damages."

The learned judge at *nisi prius* declared his opinion that if the railway was made for other purposes as well as for the carriage of coals and minerals it was not such a road as could be made in pursuance of the exceptions and reservations contained in the indenture of the demise, and he directed the jury that if they thought the railway was so made for such other purposes, as well as for the carriage of coals and minerals, then they ought to find a verdict for the plaintiff.

The court of errors and appeals held that that direction was not right. It held that the plaintiff could not claim for a trespass affecting his present possession of the land, it being in the occupation of a sub-tenant, but that it was an injury to the inheritance, or rather the portion of the term which would remain to him after the expiration of the under lease out of the term of years which was granted to him, and it used this language:

"Now, if the railway is such a railway as the defendants, at the time when it was formed, might lawfully make for the purposes for which when made they might lawfully use it, the plaintiff can have no ground of complaint by reason of the intention of the defendants also to use it for other purposes for which they have no right to use it. Such an unwarranted use of the railway, if afterwards put in execution, may entitle the tenants in possession to maintain an action of trespass, but the mere intention to commit such a trespass is no injury to the reversioner, and we therefore think that the direction of the learned judge was incorrect. The proper question for the jury, as it appears to us, was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether it was such a railway as, at the time it was made, it

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was reasonable and proper to make for the purposes for which it was lawful to make it, and for those purposes only."

But the court then proceeds to determine what would be the proper direction on a new trial. It will be observed that all reservations were there declared to be "for the purposes aforesaid," which refers entirely and exclusively to the clauses giving what is called "way leave." And then, after "the purposes aforesaid," follows: "And *particularly* of laying, making and granting wagonway or wagonways," &c. Now, that word "particularly" was the word upon which the case turned, and it shows clearly that the words which follow it were intended to be a mere amplification of the language which had preceded it. The court refers to the word "with" in the previous part of the reservation and says it means as an incident merely. That is quite plain when you read it, because, as well remarked by the court, the reservation of the timber and the minerals without a right and privilege of removing them would be nugatory, and those reservations of way leave were no more than what the law would imply. The construction put upon the word "with" in that case does not seem to me to reach the present case. That case turned upon the force of the word "particularly" and not on the force of the word "with."

For the reasons I have stated I am unable to limit the grant here in question in the manner contended for by the defendants. I am of the opinion that the word "with" has the force of the word "also" or "and" and is a mere conjunctive.

Undoubtedly the circumstance that the water company was not entitled to engage in the public service of a telegraph or telephone company, and the line was going into a region where there was no reason to suppose that there would be any public service of that sort, would naturally lead to the supposition that the telegraph and telephone line would be used for the purpose of the water company only. But against any inference from that circumstance is the very broad language of the grant itself, to which I have already alluded. It is a "telegraph or telephone line or lines" without limit in number, or any direct designation of purpose for which it was to be used, unless it be found in its

immediate connection with the grant of a right of way "for all purposes."

Moreover, I am of the opinion that this is a case where the rule that before a complainant can have relief of this sort in this court his right at law must be perfectly clear, does not apply in its full force. The complainant here is simply asking that the defendants should not enter with strong hand and destroy its property, of which it has full possession and right of possession. See in this connection, *French v. Robb*, 67 N. J. Law (38 Vr.) 260. The case is far outside that relied upon by defendants, to wit, *Broome v. Telephone Co.*, 42 N. J. Eq. (15 Stew.) 141. There the telephone company had hardly a color of right, and the landowner was defending his possession.

The effect of permitting the defendants not only to tear down the wires, which they did in this case, as before stated, but also to saw off the top of the poles, as is also charged and admitted, would be to compel the complainant either to wait for years the result of an action of trespass before enjoying the easement, or else to admit that the construction of the grant claimed by the defendants is the true one, and apply for condemnation of the additional right so claimed, and incur all the expense and hazard of condemnation proceedings.

On the contrary, I think the rule of clear right at law ought to be applied to the man who undertakes to enforce his rights by the strong hand, and that the defendants should be enjoined from enforcing his right in that manner until he shall establish it at law. I think, therefore, that the complainant is entitled to relief in this court.

One other point made by the defendants remains to be considered. The defendants offered parol proof, and it was admitted, subject to timely objection by the complainant, to the effect that at and before the time when one or more of the original grants in this case was made the purchasing agent of the water company stated to that particular grantor that the telephone line was to be used only for use in assisting in the construction and maintenance of the water works. I stated at the hearing, and I still think not only that the evidence was incompetent as tending to vary a written instrument, but that it

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was not of a character to rise to the dignity of a contract or representation which affected the transaction. In this connection I refer to *Chetwood v. Brittan*, 2 N. J. Eq. (1 Gr. Ch.) 438, on motion for an injunction, and 4 N. J. Eq. (3 Gr. Ch.) 334, on final hearing. I dealt with that case in *O'Brien v. Paterson Brewing and Malting Co.*, 69 N. J. Eq. (3 Robb.) 117, and will not repeat what I there said. I will only add that I attempted, and, I think, succeeded, in there drawing a distinction between the case where the parol evidence amounted to a stipulation that the instrument in question was not, under certain circumstances, to have binding effect, and one in which its effect was to vary the construction to be put by the court upon a written contract. In the latter case the rule is hard and fast that parol evidence cannot be used except in a direct proceeding to reform the contract. This element is not found in this case. Moreover, I see nothing in the evidence to lead to the conclusion that the remark made by the purchasing agent, as testified to by the witness, amounted to anything more than a casual explanatory remark, quite insufficient to maintain a bill to reform.

But if I had come to a different conclusion on this point I should have been met by another point made by the complainant in answer thereto, namely, that it stands in the position of a *bona fide* purchaser without notice of the parol agreement. The contents of the agreement between the city and the complainant shows a consideration passing or to pass between the two, and the complainant entered and put up its new line of poles and incurred other expenses on the strength of that agreement as it appears in writing, and this constitutes it a *bona fide* purchaser for value.

Upon the whole case, then, I find it necessary to adjudge and determine only this—that the defendants have no such right, adverse to that claimed by complainant, as to entitle them to enforce such right, if any, by the strong hand, and will advise a decree for an injunction.

MELFORD N. ROLL et al.

v.

ABRAHAM EVERETT et al.

[Decided December 15th, 1906.]

1. The owner of a tract of land conveyed it to two persons as tenants in common, the deed providing that it was agreed between the parties that it should not "conflict with the title" to any part of the granted premises previously conveyed by the grantor to any parties. Thereafter one of the grantees sued to recover possession of a parcel of the tract, and in such action the grantor of the tract gave a deposition to the effect that he had conveyed the land involved in the action to a certain person prior to the conveyance to plaintiff therein and her co-tenant, and he refreshed his memory by reference to a book kept by himself showing the various conveyances which had been made, and by consent a copy of the book was made and used on the trial. Subsequently those representing the title conveyed to plaintiff in such action sued for partition of another parcel of the tract, and defendant claimed that the land sought to be partitioned was not included in the original conveyance of the tract, and sought to show the same by producing the copy of the book which had been introduced in the former action, and by proving that it was a true copy, without any proof of any effort to produce the original. It was not shown that the one to whom defendant claimed the original owner had conveyed the land had ever claimed title, or that he was in any possession claiming under a lost deed.—*Held*, that such evidence was insufficient to establish defendant's claim.

2. In a suit for partition the court would not determine the validity of a tax title asserted by defendant, but would hold the case to await the decision of a court of law as to the validity of such title.

3. Where the interest of one tenant in common was sold under execution, the purchasers could not, by subsequent dealings between themselves, such as partitions and conveyances, of which no notice was brought to the owner of the remaining interest, increase the purchaser's interest in the premises.

In partition. Final hearing on bill, answers and proofs.

Mr. Frederic M. P. Pearse, for the complainants.

Mr. Alan H. Strong, for the defendants.

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PITNEY, V. C.

The complainants, on behalf of themselves and certain *cestui que trustents*, who are made defendants, but who are really in the same interest with the complainants, claim to be the owners of the equal undivided half of certain lands situate in the borough of South Amboy, Middlesex county, and file their bill against the defendants, other than the *cestui que trustents* just mentioned, praying for a partition.

I will hereinafter ignore the *cestui que trustent* defendants and speak of the real defendants, Abraham Everett et al., as the defendants.

The land in question consists of a block which was numbered forty-one (41), and laid out on a map of the village of South Amboy made in 1835 by one Perrine and on file in the office of the clerk of Middlesex county, and is bounded on the east by Pine avenue, on the north by Louisa street, on the west by Feltus street and on the south by Portia street.

The block lies in the extreme outskirts of the borough as now improved, and has never been improved in the least, or built on or occupied by anybody.

The streets at the east, north and west have been traveled, but not that to the south. The lot itself is covered with brush.

It is alleged by the complainant, and distinctly admitted by the defendants at the hearing, that this block of land is a part of what was in 1835 laid out by two gentlemen, Messrs. Cotheal and Thomas, as trustees for a syndicate of land speculators, and partially sold off at auction.

The whole tract thus laid out consisted of several small farms, the title of which was united in said Thomas and Cotheal in 1834.

In April, 1874, Cotheal, as the survivor of Thomas, conveyed those farms to Mary Jane Roll and Sarah E. Dey, in consideration of \$2,500.

This deed of conveyance, however, contained this clause:

"It is agreed by and between the parties to these presents that this indenture shall not conflict with the title to any part of the aforesaid premises previously sold and conveyed by the said Alexander V. Cotheal

and James P. Thomas to any party or parties, and this deed is subject to any such conveyances. And all the parks, streets and avenues as laid out on the aforesaid map are hereby excepted from this deed, and are not quit-claimed or in any manner conveyed by these presents."

It is palpable, of course, that the object was to convey all the parts of these farms which were laid out on the map of 1835 and not previously conveyed.

The complainants represent the title so conveyed to Mary Jane Roll, and the defendants, as alleged by the complainants, represent the title so conveyed to Sarah E. Dey.

The public records show that the title passed from Mrs. Dey to Everett and Perrine by a sheriff's conveyance based on an execution against said Sarah and a decree for deficiency on the foreclosure of a mortgage against her. This sheriff's deed was dated April 11th, 1877, just three years after the conveyance to Roll and Dey.

No deed appears of record from Cotheal and Thomas, or either of them, to any person for the lot forty-one (41) here sought to be divided, and which was confessedly a part of the three farms comprising the original plot of the village of South Amboy.

That Cotheal and Thomas were once seized of the lot or block forty-one (41) was admitted by the defendants.

It follows, then, that the conveyance to Mrs. Roll and Mrs. Dey passed the title to them as tenants in common, with the usual result, in the absence of anything like adverse possession or claim of title on the part of anybody else, that they, Roll and Dey, became constructively in possession of the land, and as there has been no sort of adverse claim or possession, either as between Mrs. Roll and Mrs. Dey or their grantees, or by any third party, that constructive possession continues.

To this case made by the complainant the defendants set up two distinct defences.

They do not deny that Cotheal and Thomas were at one time seized of the premises in question, and that Cotheal, as survivor, was competent to convey them to Mrs. Roll and Mrs. Dey, or that the consideration of \$2,500 mentioned in that deed was not

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actually paid in good faith by Roll and Dey to Cotheal, but they allege that block forty-one (41) was not included in the description found in that conveyance, but was excepted thereout by the language of that deed above quoted, because it had been previously conveyed away by Thomas and Cotheal to one Taylor.

Now, I conceive the burden is on the defendants to prove this, and this they attempt to do. They do not produce any deed executed by Cotheal and Thomas, or either of them, or any record of any, nor the evidence of anybody that they ever saw such a deed, or that it was ever executed. Nor do they produce any memorandum in the handwriting of either Cotheal or Thomas that they had ever executed such a deed, but they attempt to prove it in this wise:

In the year 1884 an action of ejectment was brought in the Middlesex circuit court by Mrs. Roll against one Rea to recover possession of two small building lots, parcel of another block in South Amboy, based on the before-mentioned conveyance of 1874, and in that cause the deposition of Mr. Cotheal, then alive and a resident of New York City, was taken, wherein he swore that he had made a conveyance of the lots claimed by Rea to one Leary, and for that purpose Mr. Cotheal refreshed his memory by reference to a book kept by himself, or under his immediate direction, in which he set down the various conveyances which he and his co-trustee, then dead, had made of these premises. Also an account which he had kept of the amount of money received for such sale and the persons from whom he had received it. This book and the original account he refused to have go out of his possession, but, by consent of counsel in that cause, a copy of each was made and compared and used on the trial of the case of *Roll v. Rea*, which took place in 1886. Defendants now produce the copy then made of the original book and document in Cotheal's possession, and prove by a witness that those copies are true copies of the original, compared at the time of the taking of Mr. Cotheal's evidence, and they offered the copies in evidence in this cause without any proof of any effort to produce and find the original.

The object of this offer is to show that block forty-one (41) was conveyed to one Taylor by Cotheal and Thomas in 1835.

They also produce an old copy of the Perrine map, upon which block forty-one distinctly appears, and across it is written the word "Taylor."

I admitted these documents in evidence subject to the timely objection of counsel for the complainants, but expressed the opinion at the time that the evidence was insufficient to show that the conveyance of 1874, upon which complainants rely, did not include the land in question, or rather, that the land in question was excepted from that conveyance under the excepting clause above quoted.

After having heard further argument and given the matter further consideration, I am still of that opinion.

If Taylor had ever come forward and claimed title to the land, or was in possession claiming under a lost deed, it is possible, I will not say probable, that a different ruling might be proper. But the present situation is simply this: Two persons pay for and accept a conveyance from a third party of land of which their grantor was once the undoubted owner. One files a bill against the other for partition, and that other sets up as a defence that the land in question was not included in the terms of the deed under which they both claim, or rather, was excepted out. Now, I think in such a case the person making the allegation should be held to strict proof. Such proof has not been made.

Moreover, it is worthy of remark that the clause in the deed from Cotheal to Roll and Dey of 1874 does not say that the description in the conveyance shall not be held to include any land previously conveyed, but it says that "this description shall not conflict with the title of any part of the aforesaid premises previously sold and conveyed," &c. Now, the difference between that language and the verbiage of an ordinary exception out of a description may be slight, but I think, for present purposes, it is material. It permits the doctrine of constructive possession to hold good until the actual appearance and claim made by some holder of an older title.

This conclusion renders it unnecessary to determine another question which would arise if the giving of the deed of Thomas

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and Cotheal to Taylor in 1835 had been established by parol, and that question is whether such proof would at all affect the relation of these parties to each other since it would destroy the title of each and neither have any title by constructive possession.

Here we have a party at one time the admitted owner of the premises making a conveyance of them to two parties by a description which clearly describes and includes a certain block of land, but containing a clause which, as claimed by one party, excludes all land previously conveyed. Now, it seems clear enough that such conveyance gives the grantees a color of title with constructive possession, which cannot be disturbed and destroyed by parol proof of a former conveyance under which no entry or possession has been made or taken. If such parol proof be made it does not in the least affect the relation of the two grantees to each other. It simply results in showing that neither has any title. Now, when neither has taken possession to the exclusion of the other, and neither has title, I find it difficult to perceive how either can object to a legal proceeding which will result in simply marking on the ground the limits of what would be the title of each if they had any. The only effect that I can perceive of the proof by the defendants that neither they nor the complainants have any legal title is to relieve them from the liability to pay costs.

I have looked through numerous cases, including all those cited by counsel for the defendants, and I can find no authority for the position which he here takes in that respect. The rule that the defendant in ejectment may defend his actual possession, or that of his tenant, by showing that the plaintiff has no title has no application to the present case, for the simple reason that here the defendants are not in actual possession.

The next defence set up by the defendants is a tax title supported by a deed made on the 4th day of June, 1877, by John Disbrow, collector of the township of South Amboy, to Ward C. Perrine and Abram Everett, who, as we have seen, had purchased at a sale by the sheriff the right of Mrs. Dey in the premises by a deed dated the 11th day of April, 1877.

The deed by the collector of June 4th, 1877, is based on a warrant signed by five persons purporting to be the township committee of the township of South Amboy, of whom Abram Everett, one of the grantees, purports to be the chairman, and it recites that

"it appears to the committee that one John H. Clark, one Milley D. Powers, and George Leary, who reside out of the state, were duly assessed by the assessor of said township in the sum of, Milley D. Powers for the year 1874 for \$91 and for the year 1875 \$154.56, John H. Clark for four years \$41.10, George Leary \$14.10 for their taxes for the years [without mentioning the years] on account of lands, tenements and hereditaments of the said John H. Clark, Milley D. Powers and George Leary, situate in said township, which said lands, tenements and hereditaments were by the said assessor description ——— [no description given], and that the said assessment, together with interest thereon, &c., have remained unpaid for the space of one year after the said tax was payable, you are therefore hereby commanded to make the said sum of the taxes aforesaid and interest thereon from and after the twentieth day of December, A. D. 1874, the cost and fees in relation to said assessment and the costs of the execution hereof of the lands, tenements and hereditaments so described as aforesaid, by selling the same or any part thereof as will be sufficient for that purpose for the shortest term * * * and you are further commanded to pay the money raised by such sale to the township committee and make return of this warrant and your proceedings thereunder."

Then follows a recital that the collector had given notice of the time and place of the sale "of the lands, tenements and real estate in said warrant described" by advertisement, &c., and at the time and place, on the 30th day of June, 1877, he sold and struck off the following-described part of said lands, tenements and hereditaments, namely, the lands of John H. Clark. Then follows a reference to block 41 and lots in other blocks, with a reference to the map of Perrine, in the township of South Amboy, previously mentioned, and that Perrine and Everett bid for the lands the amount of the tax mentioned in the warrant, \$127.77, for the term of seventy-five years. Then there is an acknowledgment of that deed before a master in chancery on June 4th, 1877, and the ordinary affidavit that the lands had been sold to the best advantage, &c.

To this instrument the counsel for the complainants makes

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two answers—*first*, that it is void on its face, and *second*, that if it is not so void, and the court shall be of opinion that it is a valid deed, he takes the ground, for which there is more or less authority, that one tenant in common cannot cut off the interest of another tenant in common by buying in the property under a sale for taxes under circumstances like those above recited, but that the same are subject to redemption by him at any time, and offers to pay one-half of the amount so paid by Ward and Perrine, with interest during all these years.

I will first consider his first point.

I find the law, as to sale of land for taxes, to have been in 1877 that found in the revision of 1877, page 1163, &c. It consists of the act of March 17th, 1854; a supplement of March 25th, 1863, and a supplement of March 26th, 1873. The first section compels the assessor to assess all the lands in the names of the owners, "and to designate the same by some short description as will be sufficient to ascertain the location and extent thereof."

The second section provides that the tax so assessed shall remain a lien thereon for two years from the time when the taxes were payable.

The third section provides that if the taxes remain unpaid for a year (reduced to four months by the act of 1863), then the township committee may issue a warrant to the constable of the township

"commanding him to make said taxes, with the interest, &c., of the lands, tenements and hereditaments or real estate on account whereof the same were assessed as aforesaid, and of which the assessor's description shall be therein set forth, for the shortest term."

Section 4 provides that the warrant, before execution, shall be recorded by the clerk of the township in a book to be provided.

Section 5 provides that the constable shall advertise, &c.

Section 6 directs that a deed shall be made.

Section 7 provides that, notwithstanding any mistake in the names of the owners of any lands in assessing the taxes, the assessment shall be valid.

The supplement of 1873 provides for the sale of lands of any person or persons, whether the owner is a resident or not, and provides for a sale if the taxes are unpaid for the space of four months, instead of a year, and repeats that the lien is to be for two years, and section 2 provides for redemption by the owner in one year. The revision of this act made after 1877, principally March 14th, 1879, and found in the supplement of the revision, page 990, was, of course, not in force at the time of the giving of the tax deed in this case.

The warrant in this case was issued to the collector instead of the constable, presumably by virtue of a special act entitled "An act to facilitate the collection of taxes in the township of East Brunswick, in the county of Middlesex," approved April 4th, 1871, page 1171, which act was extended to South Amboy by an act of 1872, page 616. By that act the collector of the township was given power to enforce the collection of all delinquent taxes "assessed on any real estate in said township by exposing the same for sale," &c., to the person or persons who will take the *least quantity of said land to be laid out in one body and to commence at some designated corner* of the premises on which said taxes are claimed to be due. This provides for sale in fee-simple of a specific quantity of land. The second section provides that no land shall be sold until the township collector shall have made a return that the taxes are unpaid and have by him been returned as delinquent, and shall verify the same by his affidavit. The third section provides that within ten days after the return of delinquents by the collector the committee shall cause a copy of the return to be recorded in the clerk's office and the copy to be posted in three public places. The fourth section provides that the township committee shall cause a certified copy of the return and affidavit to be published therein specifying the time and place where the same will be sold at auction, and on that day the collector shall sell the tracts to the person or persons who shall take *the least quantity of the premises* so offered, and immediately thereafter such sale the township committee shall execute and deliver to the purchaser a certificate of such sale describing the piece or pieces sold and the amount paid and entitling the

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holder thereof to a deed of the premises so sold, with a proviso that the owner may redeem within two years. It then provides that if at the expiration of one year the owner shall not appear and redeem then the collector may execute a deed. Then follows a repealer of inconsistent acts.

It is quite evident from the tax deed here in question that the township committee and the township collector have failed to follow either this special act applicable to the townships of East Brunswick and South Amboy or the general act of 1854. No proof was offered in this cause of any of the acts required by the statute to validate a tax sale either under the general act of 1854 or the special act of 1871.

Reliance was had by counsel upon the force of those sections of the act concerning the sale of lands, approved March 27th, 1874, and found in the revision of 1877 at page 1045, sections 14 and 15, which make the recitals in such a deed *prima facie* proof of their truth. The force of those recitals in tax deeds was dealt with by the supreme court in *Allen v. Woodbridge*, 42 N. J. Law (13 Vr.) 401, and on error, *Woodbridge v. Allen*, 43 N. J. Law (14 Vr.) 262. The opinion of the court of errors and appeals contains an elaborate treatise on the state of the law at that time.

Without going into detail, if it were within my jurisdiction to determine the question, I should feel constrained to hold the deed here in question absolutely void—*first*, because the recital in the deed does not show that the taxes assessed against Clark were so assessed upon the very lands which were conveyed; *second*, because they do not show that the taxes were so assessed and became payable within two years before the sale, but rather the contrary; *third*, if we look at the East Brunswick act of 1871 we find no such inconsistency in its provisions in this respect with the general act from which we can infer that the provisions in that behalf of the general act were repealed by the special act, and we find the collector in his proceedings not following the provisions of that act.

But, as I feel constrained, by the decision of the court of errors and appeals in the famous and familiar case of *Slock-*

bower v. Kanouse, 50 N. J. Eq. (5 Dick.) 461, not to determine any question of pure law in this cause, however plain it may be, I shall leave that question to be determined in the manner to be suggested farther on.

One other matter deserves attention. The defendants show that by divers conveyances and partitions between Everett and Perrine they have treated and dealt with the complete title precisely as if they owned the whole, and claim that while there has been no sort of adverse possession or occupation of the premises by the defendants or any other persons whatever at any time, yet that this dealing in conveyances, in language which indicated that they had a complete title, gives them a sort of *quasi*-adverse possession.

I cannot accede to that position.

Everett and Perrine undoubtedly bid for and accepted from the sheriff in April, 1877, a deed for the interest of Mrs. Dey. That deed recites a levy on these lands and says the description is taken from Book 146 of Deeds, pages 612, &c., which is the deed from Cotheal to Roll and Dey, and then, farther on, it specifies what part of that land is levied on, as follows:

"Also block No. 41, consisting of forty lots, being a part of the same premises conveyed by Alexander Cotheal to the said Mary J. Roll and Sarah E. Dey by deed dated April 16th, 1874, and recorded in the clerk's office of the county aforesaid."

Here, then, in the levy, which preceded the sale under execution, is a distinct notice to the purchaser that the lands they were about to purchase had been conveyed to Roll and Dey by a deed which presumably created in them an estate as tenants in common, so that the purchaser had notice that Mrs. Dey had *prima facie* only a half interest.

Now, it is quite plain that any subsequent dealings between themselves, of which no notice was brought to Mrs. Roll, could not increase Everett's and Perrine's interest in the premises. Mrs. Roll and her successors in title were under no obligations to watch and take notice of the subsequent conveyances between Perrine and Everett of the interest which they acquired under the sheriff's deed.

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Complainants argue that this court has, in some instances, assumed jurisdiction to determine the validity of a tax title. But those instances were cases where the tax was outstanding and a cloud on the title and the bills were filed especially to remove the cloud, or where the question of the validity of a tax title arose incidentally in a foreclosure proceeding or the like. In the present instance, complainants do not attack the tax title by their bill and it is not framed with that view. Nor do I find any more strength in the further point made by the complainants, namely, that the title of the defendants, or some of them, is equitable only. That circumstance does not give the complainants any right to invoke the aid of this court to deal with so much of the defendants' title as is clearly legal. For reasons already given, I feel constrained to await the decision of a court of law as to the validity of the tax title.

Under the circumstances of this case, where neither party have anything more than a constructive possession of the premises, I think the burden is on the defendants to establish their title under the collector's deed, and I will hold the case to enable the defendants to establish that title as they may be advised. Proceedings for that purpose must be taken within thirty days, and if they shall be advised to bring an action of ejectment against the complainants the bringing of such action shall not be held, except for the purposes of the action, to be an admission that the complainants are in actual possession, and any other provisions may be inserted in the decree to be advised as may be proper to protect the rights of each party in the premises.

The question whether, if the tax title is established, it is subject to redemption by complainants as a tenant in common, is reserved.

Beling v. American Tobacco Co.

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GEORGE AUGUST BELING

v.

THE AMERICAN TOBACCO COMPANY et al.

[Decided January 4th, 1907.]

After the filing of a consolidation contract between certain corporations, the business previously transferred by the constituent companies was carried on by the merged corporation as an entirety, and a large amount of the property received by the merged corporation had been sold, exchanged, or converted into other forms, and the receipts therefor had been so commingled that it became impossible to identify the same or to separate the business of the constituent corporations. Complainant, a stockholder in one of such corporations, made no objection to the merger until nearly six months after the merger agreement, during which time the consolidated corporations' securities had been put on the market and were largely dealt in. It also appeared that complainant's assignor, who was the administrator of the record holder of the stock, had received notice of the meeting at which the merger agreement was entered into, and complainant when he acquired the stock had actual notice thereof, and bought the stock for the purpose of suing to set aside the consolidation.—*Held*, that complainant was not entitled to a decree vacating such merger agreement and requiring the officers of his corporation to resume possession of its assets and continue to transact its business.

Final hearing on bill and answer.

Mr. Thomas L. Raymond and *Mr. William M. Seabury* (of New York), for the complainant.

Mr. Richard V. Lindabury and *Mr. Charles L. Corbin*, for the defendants.

PITNEY, V. C.

This is, in substance and effect, a bill for the specific performance of a continuing contract in writing, consisting of a certificate of capital stock, dated February 28th, 1894, issued by the then American Tobacco Company to one Fannie Soule, by which

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it was certified that she was the owner of one hundred shares, of \$100 each, of the preferred capital stock of the American Tobacco Company, which stock was entitled to dividends not exceeding eight per cent. for each year out of the net profits for such year, payable quarterly, in preference to the common stock, and also a preference on the assets of the company on the final distribution or division thereof (1940).

Fannie Soule, the beneficiary named in this certificate, died February 28th, 1895, and one J. Forbes Potter became the owner and holder of said certificate of stock by virtue of letters testamentary of the will of the said Fannie Soule, and held the said certificate until the latter part of the month of January, 1905, when he sold and assigned it to one Schalk, who held it until the 15th day of February, 1905, and on that day sold and assigned it to the complainant, Beling.

In the meantime the ownership of the stock stood on the books of the company in the name of the said Fannie Soule, and dividend checks were sent to her at her address, as recorded on those books, four times each year until the month of September, 1904. Those checks were presumably received by the executor and collected by him in the ordinary course of business.

The business of the American Tobacco Company, as declared in its articles of association, was

"to cure leaf tobacco, and to buy, manufacture and sell tobacco in all its forms, and to establish factories, agencies and depots for the sale and distribution thereof, and to transport, or cause the same to be transported, as an article of commerce, and to do all things incident to the business of trading and manufacturing aforesaid."

On the 9th day of September, 1904, the American Tobacco Company entered into an agreement of consolidation and merger with two other companies engaged in the tobacco business, to wit, the Continental Tobacco Company and the Consolidated Tobacco Company, to consolidate and merge those three companies into a new company, to be known as the American Tobacco Company, all the said corporations being New Jersey corporations, and said agreement of merger was afterwards approved by a meeting of the stockholders of the American

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Tobacco Company held, after due and legal notice to each stockholder, on September 30th, 1904.

The agreement of merger was filed in the office of the secretary of state on the 20th day of October, 1904.

The proceedings were had in pursuance and by virtue of section 104 *et seq.* of the Corporation act of 1896 and the supplements thereto of April 10th, 1902. *P. L. p. 700; Dill. Private Corp. (4th ed.) 128 et seq.*

The merger agreement provided that the new corporation, the present American Tobacco Company, should assume 'all the obligations of the old corporations, and provided for the satisfaction of the preferred stock of the old companies, amounting to \$14,000,000, of which the complainant is the holder of \$10,000, by the issuance of six per cent. bonds, maturing in 1940, the date of the expiration of the original American Tobacco Company's corporate existence, such bonds to be delivered to the holders of the preferred stock in the proportion of \$13,333 of face value of the bonds to \$10,000 of the face value of the stock, with a provision for fractions. So that complainant had the option to receive for his certificate of stock six per cent. bonds maturing at the time that his certificate of stock, so to speak, would have matured, which would produce him precisely the same income that his preferred stock, under the most favorable circumstances, could have produced him, and insure him at its maturity one-third more than its face value. Further, as appears by an examination of the consolidation agreement, the security for its payment would have been much better than that for the payment of dividends on his certificate of stock. Then comes the fact, distinctly alleged in the answer, that the market value of complainant's stock was at once increased as the result of the merger, so that presumably Potter received a greater price on his sale to Schalk than he otherwise could have received.

The only respect in which the holders of such preferred stock could have been the losers by the exchange was in the loss of the right, if any, to participate in the division of the surplus assets of the old American Tobacco Company, at its winding up in 1940, over and above sufficient to pay all classes of stock at par.

The question of this right so to participate was discussed at

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length, but I do not deem it worth while to express a definitive opinion upon it, since it abundantly appears that the shares of common stock were more than three times the number of that of the preferred stock, and the control of the company was absolutely in the common stockholders, and the directors, being elected by the holders of the common stock, would naturally see to it, by the exercise of their power to declare dividends, that the preferred stockholders should receive no more than the par value of their stock at the end of the corporate existence of the company.

It sufficiently appears, from the pleadings, exhibits and schedules, that the property of the company is composed so much of general merchandise and of individual units quite susceptible of being sold in pieces as to present no obstacle to the consummation of what would almost necessarily be the natural desire of the common stockholders. And this circumstance makes the case a complete contrast to that of *Bridgewater Navigation Co.*, 39 Ch. Div. 1 (1888); *Birch v. Cropper*, 14 App. Cas. 525 (1889), which is an authority relied upon in support of the proposition that preferred stockholders have an equal right with the common stockholders to share in surplus assets.

I am satisfied that the allotment of bonds to the complainant or his predecessor in ownership was a fair equivalent for his stock.

This offer, however, the complainant declined to accept, and by his bill charges that the whole proceedings to merge, though taken and carried through strictly according to the terms of the act of 1896, were absolutely void as to him and the then holder of his certificate of stock, for the reason that that act was passed after the organization of the original American Tobacco Company and after the issuance of the certificate of which he is now the owner.

His argument is the simple one so often advanced, viz., that his certificate of stock was a contract into which must be read the provisions of the Corporation act of the State of New Jersey at the time (1890) that the original American Tobacco Company was organized, and that no more than those provisions can be so read into it; that at that time it was not competent to

merge that particular corporation with any other corporation. Hence, he argues, the act of 1896 was absolutely void as to him and his contract, and the proceedings taken under it to merge were as to him absolutely void.

On this basis he prays that the whole proceeding may be set aside, and that the original American Tobacco Company may be compelled to transfer on the books of that company the one hundred shares of such stock to him, and that the merger agreement may be declared null and void as to the complainant and as to the assets of the original corporation, and that the merger itself may be declared to be void, and that the property of the original American Tobacco Company may be declared free and discharged of all liens, by mortgage or otherwise, made thereon since the merger, and that all such liens, as to the complainant, may be declared to be void, and that there may be an ascertainment, under the direction of this court, of the personal and real estate and other assets of the original American Tobacco Company at the time of the merger, and that the same may be separated from the property of the merged corporation and be redelivered to the officers and directors of the original American Tobacco Company, and that there may be an ascertainment of the amount of loss and damage sustained by the original company, and that a receiver may be appointed to take charge of all the property and assets of the American Tobacco Company, and to recover from the merged corporation all of the assets of the original company, and that a mandatory injunction may issue to compel the performance of the decree to be made by the court, and also for other relief.

With regard to any liens put upon the property by the new corporation, the inability of the court to grant the prayer in that behalf appears when we consider that no holder or trustee of any such lien is made party hereto.

A consideration of the wide sweep of the prayer and the task it asks the court to perform is sufficiently startling when we consider that the terms of the merger have been accepted by thirteen million eight hundred and eight thousand five hundred shares of the preferred stock out of a total issue of fourteen million, leaving only one hundred and ninety-one thousand five

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hundred outstanding, and that all the other provisions of the merger for exchanging preferred stock of one or the other of the merger corporations for bonds of the new corporation and for the exchange of the stock of the old companies has been carried out to an extent equal in proportion to that of the preferred stock of the American Tobacco Company, and that the new bonds and new preferred stock of the merged company have been put upon the general security market and dealt in to a large extent, all before any notice to the defendants or public of the claim now made on behalf of the complainant by his bill.

The first notice was in a letter dated March 4th, 1905, nearly six months after the merger agreement, and it appears that in the meantime not only had these securities been put upon the security market in New York, but, as appears by the answer, after the filing of the merger contract, October 20th, 1904, the business theretofore carried on by the three constituent companies separately has been carried on by the merged corporation as an entirety; that a large amount of the property received by the merged corporation from the constituent companies had been sold, exchanged or converted into other forms, and the receipts therefor have been so commingled that it became impossible to either identify or separate the same, and that the funds in general have been so commingled and otherwise disbursed in the general course of business that it was impossible at the time the complainant's bill was filed to restore the affairs of the company to their original condition.

Before considering the question whether the court, under such circumstances, ought to undertake to grant the prayer of the bill, it is necessary to notice a point made by the defendants.

The complainant in his bill, apparently feeling that the point would be made against him that his predecessors in title had been guilty of laches, alleges that Potter, the previous holder,

"received no notice of the said alleged meeting of the stockholders held on the 30th day of September, 1904, and that he had never voted on said stock at any time upon any proposition presented to the stockholders to be voted on, nor had he at any time given any proxy to any person to vote for him; * * * that he received no notice from the officers of said company, or from any other source whatsoever, of the said merger agreement or its proposed adoption; * * * that all the proceedings taken to

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carry out said merger was done without the knowledge, connivance or consent of Potter, and that he was never notified of the closing of the books of the original American Tobacco Company until the month of February, 1905,"

and it alleges the same as to Schalk, the intermediate owner between Potter and the complainant, and it then says that complainant himself has never given his consent by word or act to the merger.

This allegation, it will be observed, is of a fact or series of facts not within the knowledge of the defendants, and therefore not admitted by a failure to deny.

The complainant in his argument makes the cardinal mistake of presuming that, because these allegations are not specifically denied by the answer, they must be taken to be admitted. But this is not the rule. If no answer at all had been filed and a decree *pro confesso* taken, that decree would not have availed the complainant to the extent of entitling him to a final decree. By the well-settled practice of the court he would have been obliged to adduce proofs *ex parte* to sustain every material allegation in his bill.

It appears, however, by the answer that, as already stated, the stock all the while stood on the books of the company in the name of Mrs. Soule, and that the regular quarterly dividends had all the time been sent to her at the address found on the books of the company in connection with her name as a stockholder. And then, in answer to the specific allegation of non-notice to Potter of the proceedings in merger, the answer states that the defendants have no knowledge as to what notice J. Forbes Potter had of said merger agreement or of the stockholders' meeting called to ratify the same, but says that notice of said meeting and a copy of said agreement were mailed to the said Fannie Soule at her post-office address given on the books of the company, which is the same address at which notices of every other stockholders' meeting have been sent to her since the said stock was transferred to her in 1894. Then further on is another allegation charging Potter with actual notice through the public prints, wherein it was widely discussed.

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Now these allegations, taken in connection with the fact that dividend checks were sent to Mrs. Soule four times a year, and that it appears by the exhibit annexed to the bill that at least two stockholders' meetings were held between 1895 and 1903, and the fact that it does not appear that Potter has ever complained that he did not receive his dividends, amounts to an averment of facts from which I feel bound to infer that Potter did receive actual notice of the meeting of September 30th, 1904.

Counsel for the complainant made the mistake in his argument of supposing that the positive allegation in the bill of non-notice to Potter, unless explicitly denied, stood as if proven, but, as before observed, this is incorrect. That rule applies only to allegations of matters within the knowledge of the defendants, and the defendants' answer herein to the allegation put the complainant on proof of non-notice, the right to make which proof he waived by going to hearing on bill and answer.

I must therefore hold that Potter did have actual notice of the meeting of September 30th, 1904. And certainly if he did not it was his own fault and not that of the defendants, since he permitted the ownership of the stock to stand on the books of the company all these years in the name of his testatrix at her original address.

The answer further alleges:

"This defendant alleges, however, that both the said Rudolph Schalk and the said complainant had notice of the said merger before they acquired the said stock, and the said stock was acquired by them not as an investment, but for the sole purpose of bringing such a suit as the present one."

Now, this allegation, distinctly made in the answer, is admitted by the complainant.

Before considering its effect one other fact set up in the answer and likewise admitted is worthy of notice, namely, that at the meeting of September 30th one million one hundred and fifty-eight thousand nine hundred and thirty-four shares of both classes of stock out of a total of one million two hundred and thirty thousand outstanding were present or represented by proxy, and of those so present one million one hundred and fifty-seven thousand two hundred and fourteen shares voted for the

adoption of said agreement and seven hundred and twenty shares voted for the rejection of the same.

It thus appears that nearly ninety-five per cent. of all the shares voted in favor of the merger, and of those actually voting nearly ninety-nine per cent. voted in favor of it.

Now, taking all these circumstances together, and the fact that the agreement has been acted upon to the extent I have previously mentioned, and the extreme difficulty, if not the impossibility, of practically granting the complainant the relief he asks, and that the old American Tobacco Company has practically ceased to exist, the question arises whether, admitting to the fullest extent the complainant's legal right, this court ought to attempt to grant him the relief he asks for. That relief amounts to a decree for the specific performance of the contract implied in the certificate of stock that the American Tobacco Company would, by its regular organization, its directors and officers, proceed to carry on the business provided for in its certificate of organization until the end, in 1940, of the term of its existence, also provided for.

Now, in order to carry out that agreement as prayed for, it will be necessary not only to perform the well-nigh impossible task of taking the account previously mentioned, but also to revivify the old company, whose existence was ended by the merger agreement, by calling the stockholders together to elect a new set of directors, after those stockholders have surrendered all their stock and taken in its place new stock and bonds in the new company in pursuance of the elaborate scheme set forth in the merger agreement, and, if they fail to do so, to submit the old company to the management of the small fraction of the stockholders of the old company who may yet have refrained from accepting the securities provided for them by the merger agreement.

Now, I conceive that the case presented is one in which the court is thoroughly justified in refusing to give specific performance.

It is well settled that the court will not, in all cases, grant specific performance. It is always, in a sense, a matter of judicial discretion. The difficulty of specifically performing the con-

tract and its effects and consequences to the parties, the comparative injury to the one party and the benefit to the other, are to be taken into consideration.

The latest illustration of this rule is found in *Speer v. Erie Railroad Co.*, 68 N. J. Eq. (2 Robb.) 619. The subject is touched upon by Professor Pomeroy (*Pom. Spec. Perf.* § 303 *et seq.*), and the general subject is dealt with in section 36 *et seq.*

I shall not go into the authorities, and will content myself with saying that this is a case in which the court ought not to assist the complainant to the extent which he asks.

The complainant's assignor, Potter, is chargeable with negligence in not coming forward and asserting his rights in time to have prevented the merger from being so far carried out as to render it practically impossible to grant the relief which he asks.

This view renders it, perhaps, unnecessary to take notice and pass upon another point made by the defendant, and that is that while the act of 1896, providing for a merger, was not in existence at the time the original company was organized, the law then in force did provide for the winding up of a company before the time provided for in its charter or certificate of organization, and that this agreement of merger amounted to a winding up of the old company.

The act then in force was that of April 7th, 1875 (*Rev. p. 175*), which in the seventh subdivision of the first section gives express power to any corporation to wind up and dissolve itself or be wound up and dissolved in the manner thereafter mentioned. The provisions for dissolution are found in the thirty-fourth section of that act on pages 182 and 183. This section was slightly amended by the act of February 21st, 1877 (*P. L. p. 20*), and this section was substantially re-enacted by the act of 1896, section 31. *Dill. Mun. Corp. 51*.

Now, the existence of this act shows clearly the fallacy of the complainant's argument that, by the contract, he is entitled to have the old company carried on until the time limited in its original certificate of organization, and it meets and disposes of many of the *dicta* cited in his argument and relied upon to support his position. That right to have the business carried on

until the natural death of the corporation is subject to the will of the majority of two-thirds provided for in the statute.

✓ Now, while the merger proceedings here attacked do not amount, strictly speaking, to a legal winding up, their effect was, in substance, precisely the same, and the only difference to the complainant is that he did not receive the share of the proceeds of the winding up which he would have got under formal proceedings under the statute.

But the large vote for the merger shows conclusively that, if the winding-up proceedings had been necessary, they would have been taken and pursued to the end, and it further indicates, with sufficient certainty for present purposes, that if the decree asked for by the complainant were granted, its practical effect to the complainant would be immediately met by formal winding-up proceedings.

✓ The complainant argues with great force that the negligence or laches of his predecessor in title cannot, upon any legal or equitable principle, be extended so far as to forfeit his rights. Granting the general proposition to be as claimed by him, yet the complete answer is that the refusal to grant his decree does not work any forfeiture of his rights, but simply has its weight, in connection with other circumstances in debarring him from
✓ the special and extraordinary relief which he is asking. For it must be borne in mind that not a single stockholder of those who appeared at the meeting did anything more than vote against the merger; no formal protest was made or proceeding taken to prevent the merger; the small minority quietly acquiesced in the action of the great majority, and that majority, acting on that acquiescence, proceeded with the merger, and so far altered the situation as to render it now well-nigh impossible to grant the relief asked for by the complainant.

Complainant relies as a precedent for his decree upon the familiar cases of *Kean v. Johnson*, 9 N. J. Eq. (1 Stock.) 401; *Zabriskie v. Hackensack Railroad Co.*, 18 N. J. Eq. (3 C. E. Gr.) 178; *Black v. Delaware and Raritan Canal Co.*, 22 N. J. Eq. (7 C. E. Gr.) 416, and *Mills v. Central Railroad Co.*, 41 N. J. Eq. (14 Stew.) 1.

The principles established by those cases do undoubtedly apply

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here, but neither of them are precedents for the relief asked for in the present case. In the first place, the subject-matter of the contract was, in each case, quite different, as well as the character of the business carried on from that in this case. The subject-matter was a unit which had a continued existence in its original condition and was incapable of daily change in form or substance. In neither case had that form and substance been changed or the mode of its use altered. In the *Black Case* and in the *Zabriskie Case* the remedy asked for was purely one of restraint against the consummation of a proposed change in the contract. In the *Mills Case* the relief prayed for was simply to set aside a lease of the subject-matter and was accomplished without the least disturbance of the operation of the subject-matter. And Mr. Mills had attended the meeting and voted against the lease. In the case of *Kean v. Johnstone* the prayer went a little farther, but not so far as asked for here. It did not in anywise disturb the existence or operation of the subject-matter. It simply prayed an account of the property of the original road under the new organization, and that the purchase complained of and the bonds and mortgages issued might be declared void, and for an injunction against further issue of bonds and mortgages. The cause was heard on general demurrer to the equity of the bill. No mortgagee or holder of any of the bonds was made a party, and there was no demurrer for want of parties. The demurrer was simply overruled, and no further proceedings were ever had in the cause, so far as the records of the court show. So that the case is not a precedent for the decree here asked for.

Counsel were unable, as I must presume, to produce any case where a decree like that asked for here has been made by a court of equity.

Defendant offers to pay complainant in cash the market value of his stock at the time of the consolidation or the present worth of his stock, with all dividends that can be possibly received thereon up to the expiration of the old charter, meaning by this last the value of the coming payments discounted. Of course, complainant can have the six per cent. bonds originally allotted to him.

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The only decree other than that offered by the defendant, which I have been able to conceive can be properly made in favor of the complainant in this cause, is a decree for the payment quarterly of the eight per cent. dividend on the amount of the stock from the date of the last payment up to the termination of the charter of the old company and the payment of the par value of the stock at that time. Such a decree was not suggested at the argument, and I am not ready, without argument, to say that I will advise it. I am willing, if complainant shall so wish it, to hear argument on the propriety of such a decree. If he does not wish it, I must advise that his bill be dismissed without prejudice to his right to his action at law, which, in my judgment, is ample to give him the full value of his stock at the time of the merger. If the complainant chooses to accept either of the offers made by the defendant in its answer, a proper decree will be advised, without costs.

RICHARD T. DANA, administrator of RICHARD S. DANA, deceased,

v.

THE AMERICAN TOBACCO COMPANY and THE MORTON TRUST
COMPANY et al.

[Decided January 8th, 1907.]

1. Where complainant acquired certain corporate stock as administrator of his father, who died in 1904, it was complainant's duty either to have the stock transferred on the books of the company or to give distinct notice that subsequent notices of meetings sent to him as a stockholder should be sent to a certain address, in order to charge the corporation with neglect in continuing to send notices to the address of his father as the registered holder of the stock.

2. Complainant acquired certain stock in defendant company as administrator of his father's estate, but took no steps to have the stock transferred until after his return from Europe, when he learned that proceedings were in progress for the consolidation of the corporation with

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certain other corporations. Complainant waited some eight weeks before he employed local counsel to attack the merger, during which time the new corporation's stockholders' "rights certificates" and corporate bonds had been issued.—*Held*, that the complainant was not entitled to the relief prayed for, which consisted in the actual separation of the original assets of the corporation whose stock was held by complainant, and the resuscitation of the corporation and its being compelled by a decree of this court to proceed to conduct the business provided for in its articles of association.

On final hearing on bill, answer and proofs.

Mr. James E. Howell and *Mr. Grosvenor Nicholas*, of New York, for the complainant.

Mr. Charles L. Corbin and *Mr. Richard V. Lindabury*, for the American Tobacco Company and the individual defendants.

Mr. Robert H. McCarter, attorney-general, and *Mr. Bronson Winthrop*, of New York, for the Morton Trust Company.

PITNEY, V. C.

This bill is almost identical in frame and prayer with that of *Beling v. American Tobacco Company*, just decided.

The certificate of preferred stock held by the complainant was issued to his intestate in 1892 and the intestate died in 1904. The stock was never transferred.

The prayer of the bill, though varying somewhat in verbiage from that in the *Beling Case*, is in substance the same. It prays that the merger agreement and the merger itself, in all its aspects, may be held to be void as against the complainant; that the lien of the mortgage made by the new company to the Morton Trust Company may be removed from the property of the American Tobacco Company and be declared null and void as a lien thereon, so far as regards the rights of the complainant; that there may be an ascertainment of the specific items of real and personal estate and other assets owned by the original company at the time of the merger, and that the same may be separated from the property of the merged corporation and be redelivered to the officers and directors of the American Tobacco Company;

that there may be an ascertainment of the loss by reason of the merger, and that the stockholders of the original company who are made parties to the bill may be made liable therefor and charged therewith by the decree of this court, and that the court will issue a mandatory injunction to compel performance of its decree, and that the merged corporation may account for all the profits, income, properties and moneys derived by it from the assets of the original corporation, and for other relief.

The defendants' answer is much the same as the answer to the Beling bill.

At the hearing a large amount of evidence was taken verifying in detail the allegations of the answer, which were admitted by the complainant in the *Beling Case*.

It was further proven that most of the few stockholders who had voted against the merger agreement had come in and accepted the terms of that agreement.

With regard to the attitude of the complainant and his conduct, the case differs from that of Beling. The complainant's father died in January, 1901, and complainant took out letters of administration, and about the 1st of June complainant wrote a letter to the company stating that he was about to leave for Europe, to be gone during the summer, and wished his dividends put to his credit in a bank which he named. This letter at its head stated his business address at an office which he occupied in New York City. But the complainant did not have his stock transferred to his name. It consisted of two certificates of \$5,000 each, and he contented himself with handing over one of those certificates to his brother, who was, besides his mother, the sole next of kin.

No entry having been made upon the stock ledger of this change of ownership and address, the notice of the meeting and the copy of the contract of merger were sent to the residential address of his late father in New York City, which, at the time, September 9th, that they were sent, was in the hands of a caretaker. The widow, who was also a stockholder, and who resided there, was, at that time, still stopping at her country place in the Berkshires.

Affirmative proof was given tending to show that for some

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unexplained reason neither the notice to the complainant's intestate nor to his widow was ever actually received.

The complainant returned from Europe on the evening of October 5th, entirely ignorant of what had taken place in his absence, but after attending to his own private affairs and business, which occupied a few weeks, he seems to have bethought himself of his dividends on the tobacco stock, and applied to the Farmers' Loan and Trust Company, the transfer agent, on or about the 10th day of November, and then and there learned that the company was no longer in existence, and very shortly—two or three days afterwards—received copies of the merger agreement which contained all the particulars. He had, however, some few days or weeks before that, heard indefinite rumors of some change in the organization or management of the company. He immediately consulted his New York counsel and with him alone undertook to study the situation and his rights. He also interviewed counsel of the tobacco company and correspondence ensued running over into January, 1905, and early in that month he served a written protest on the company, which was the first that he had made a definite declaration of his position.

In the meantime the transactions provided for in the agreement of merger had been carried through by the surrender of the original certificates of stock and bonds and the issuing in place thereof, as usual in such cases, temporary negotiable certificates to be delivered to the trustees when the permanent securities had been engraved, prepared and signed to be exchanged therefor. The complainant's protest reached the company before the actual exchange for temporary certificates for permanent securities had taken place, but in the meantime those temporary certificates had become an article of mercantile dealing.

Now, under these circumstances, each party charges the other with negligence and laches. The defendants charge the complainant with laches in not having the certificate of stock formally transferred to him, and giving his address to be entered on the stock ledger, and next in that, upon receipt of a copy of the merger agreement and being informed, as he was, that the merger had been or was being consummated, and

being aware, as he must have been, that changes were daily taking place in the situation, both of the business conditions of the new company and in the ownership of the securities issued by it, he did not immediately take advice of counsel learned in New Jersey law as to his rights and remedies thereon.

On the other hand, the complainant complains that the defendants ought, on the receipt of his letter asking them to have his dividends put to his credit in the bank, to have made such memorandum of it as would have resulted in the notice of the meeting of September 30th being sent to his business address, in which case he claims it would have reached him at that address in New York City.

The defendants' reply to that is that that letter referred wholly to dividends and did not at all call their attention to his business address but to the address of his bank, the former appearing only in print at the head of the letter, and hence that it was misleading. I find by examining the correspondence that it does seem to have misled them; and they farther claim that the regular course of business and the terms of the statute require them to send the notice to the party in whose name the stock stands on the books of the corporation, and that they were not justified or required to change the address upon an implied notice of that sort.

I am inclined to think that the defendants' position is sound, and that the complainant's duty was either to have the stock transferred on the books of the company or to have given them distinct notice that any notice sent to him as a stockholder should be sent to a certain address. But the evidence leaves me in doubt whether he would have received the notice under any circumstances. The only effect of his receiving it on his return from Europe would have been to enable him to have filed a bill in this court to restrain the merger before it was consummated as it was on October 20th by the filing of the dissolution papers in the office of the secretary of state.

The positive negligence with which I think the complainant is chargeable consisted in his failure immediately to employ New Jersey counsel, and to make a prompt decision and take prompt action thereon. By failing in that respect, and occupying some

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eight weeks or so in determining what ground and course he would take, he undoubtedly seriously increased the difficulties in the way of granting the relief here asked for. For not only were the temporary securities issued by the company dealt in on the market in the meantime, but the mercantile subjects of its business were being changed and the difficulty of a separation were increasing daily.

The present case is not so strong against the complainant in the matter of acquiescence and laches as was found in the *Beling Case*. But while I find that fact I am still of the opinion that it is a case in which relief as prayed for should not be granted. The injury and disturbance to business affairs is too great and serious as compared to the benefit to be derived therefrom by the complainant to justify that extraordinary remedy.

I have said the complainant prayed for specific performance of a contract. I will add that the decree prayed for much resembles a decree for the specific performance of a continuing contract. Complainant asks for a mandatory injunction to compel the officers and directors of the extinct tobacco company to resume their functions, to take charge of the property of the old company, and, as I understand the scope of the prayer, to carry on that company's business until the year 1940, unless sooner dissolved. That is a sort of function that this court is very cautious about undertaking, and I am unable to bring my mind to adjudge that it ought to do it in this case.

I will advise the same decree in this case as that proposed in the *Beling Case*.

The defendants, by their answer, allege that the complainant never applied to the tobacco company to waive the bar of the statute to the appointment of appraisers to ascertain the value of his stock, under the provisions of those sections of the Corporation act which provide for dissolution, and declare that the company in fact has been willing and is now willing to consent to such an appraisal, notwithstanding the expiration of the statutory period of thirty days.

The tobacco company, defendant, by its answer, also offered to pay complainant the market value of his stock at the time of the consolidation, or to pay him the present worth of said stock

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and of all dividends that could possibly be earned thereon until the expiration of its charter, or to pay complainant such a sum of money as may be ascertained by this court in this proceeding to represent the proportionate share of the assets of the original American Tobacco Company, to which the complainant would be entitled as the owner of its preferred stock, mentioned in the bill, if the company were dissolved and its assets liquidated under and in accordance with the statute. And it submitted itself to the jurisdiction of the court in this behalf and consented to the entry of a decree against it in favor of the complainant, upon any one of the offers just mentioned which the complainant may elect to accept.

If the complainant shall decline to accept any one of these offers I shall advise a decree that his bill be dismissed, without costs.

ANNIE A. SPILTOIR

v.

GUSTAV E. SPILTOIR.

[Decided June 15th, 1906.]

1. Presumption of death, after an unexplained absence of seven years, does not arise where the supposed decedent has been heard from and there is reliable information that he was alive within four years.

2. *1 Gen. Stat. p. 1187* provides that anyone absenting or hiding himself for seven years shall be presumed to be dead "in any case wherein his or her death shall come in question," and provides for the property rights of the parties on the return of the supposed decedent. *P. L. 1898 p. 808 § 52* relieves from criminal punishment a wife who in good faith marries after the husband has absconded, but does not legitimize such second marriage.—*Held*, that *1 Gen. Stat. p. 1187* has no application to a proceeding for divorce against an absconding husband not heard from, and hence will not prevent the granting of a divorce.

On exceptions to the master's report dismissing petition. Exceptions sustained, and decree granting divorce advised.

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The report of the master is substantially as follows: That on the 29th day of June, 1897 (this is an error for 1898, and the wife corrected her testimony in this respect), the parties were and had for a long time been living together as man and wife in this state, where they had been married; that on the day last named the defendant deserted the petitioner. The report then continues: "And I do further report that since June 29th, 1897, so far as the testimony in this case shows, the defendant has not been seen or heard of. Where he went, when he left the petitioner, is unknown. Various persons who would have been likely to hear from him had he been alive were produced as witnesses, but their testimony is that they have heard nothing from him. The testimony undoubtedly warrants the conclusion that when the defendant went away he intended to desert his wife. In view of these facts my opinion is that it is necessary for the petitioner to overcome the presumption of death which arises by reason of the statute entitled 'An act declaring when the death of persons absenting themselves may be presumed,' passed March 7th, 1897. 1 Gen. Stat. p. 1187. Naturally, as I view the case, it is important that the petitioner show that the defendant is alive in order to maintain the suit at all, and for that purpose she should overcome this presumption by some proof. I do therefore report that the petitioner's petition should be dismissed." To this finding the petitioner excepts.

Mr. George D. Mulligan, for the exceptant.

PITNEY, V. C.

I agree with the learned master in the result at which he has arrived that the defendant willfully deserted the petitioner on the 29th day of June, 1898, and that such desertion and its continuance from that time was willful and obstinate. But I am unable to agree with him in his conclusions—*first*, that the evidence warrants the presumption that the defendant was, at the time of the hearing before him, dead; and *second*, that our statute regulating presumptions in such cases has any application to the present case. The evidence is clear that the petitioner heard of her husband, and had reliable information that he was

alive, within four years. The general common-law rule of presumption of death after an absence without being heard from for seven years is held strictly, and reliable information that the party is living within that time is usually fatal to the presumption, although juries, especially in criminal cases, have been permitted to presume death in a less period of time, and are entitled also to take into consideration a great variety of circumstances, including the state of health and the motives which impelled the absenting party to leave his home and disappear. But in civil cases involving the devolution of title to land or the succession to personality, the rule has been held more strictly.

The statute of this state (*1 Gen. Stat. p. 1187; P. L. 1895 p. 751*) is as follows:

"That any person, whether a resident of this state or not, who shall remain beyond sea, or absent himself or herself from this state, or from the place of his or her last-known residence, or conceal himself or herself in this state, or in the place of his or her last-known residence, for seven years successively, shall be presumed to be dead, in any case wherein his or her death shall come in question, unless proof be made that he or she were alive within that time; but an estate recovered in any such case, if in a subsequent action or suit, the person so presumed to be dead shall be proved to be living, shall be restored to him or her who shall have been evicted, and he or she may also demand and recover the rents and profits of the estate during such time as he or she shall have been deprived thereof with costs of suit; provided, however," &c.

Now, it seems to me that the very reading of that act shows that it was intended to apply wholly to cases where property rights were involved, arising out of descent or succession, and that it is impossible to apply it to the present case. This is too plain for argument. Notice the words, "in any case wherein his or her death shall come in question." Now, the death of the defendant did not come in question in this case. It was not an issue raised by the pleadings, and whatever evidence is found in the case tending to show an absence of seven years came out incidentally. It seems to me to approach the absurd to hold that a married woman becomes a widow to all intents and purposes as soon as her husband has absented himself from the state for seven years. Our Crimes act (*P. L. 1898 p. 808 § 52*), which relieves an innocent spouse whose husband has absconded, and who, on

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the strength of that absence, marries again, does not legitimize the second marriage or its issue if the former spouse be found later on to be living. It simply relieves the innocent party from criminal punishment. It does not in anywise impugn or create any exception to the first section of the act of April 3d, 1902 (*P. L. p. 490*), declaring absolutely void a marriage contracted by a party who has another spouse living. A person situate as is the petitioner here, who marries again without procuring a divorce, does so entirely at his or her peril as to the validity of the marriage and the legitimacy of the offspring. See *1 Bish. Mar. & D. §§ 717, 1812*.

In some other states of the union the section of the statute above cited, relieving an innocent spouse from criminal prosecution, is accompanied with other provisions giving the issue of such a marriage a sort of legitimacy. This subject was considered by the supreme court of Massachusetts in an opinion delivered by Chief-Justice Gray in 1874. *Glass v. Glass, 114 Mass. 563*. There a party, situate as is the petitioner here, married a second time; both she and her husband believing that the first husband was dead, and founding their belief on his absence for seven years. He afterward appeared, and the second husband brought suit for a declaration of nullity. The learned judge, in delivering judgment, used the following language: "It must be assumed, upon the report of this case, that the second marriage was contracted by both parties in good faith and with the full belief that the respondent's former husband was dead. As he had been absent for seven years, they might not be guilty of polygamy. *Gen. Stat. 1860 c. 165 §§ 4, 5*. But as he was in fact still living, and the first marriage had not been dissolved by a decree of divorce, the respondent was in law his wife, her second marriage was unlawful, and the information which both parties to it had on the former marriage, and of the circumstances connected with the absence of the former husband, cannot estop either to apply to the court for a decree of nullity." The case of *Burkhardt v. Burkhardt, 63 N. J. Eq. (18 Dick.) 479; 52 Atl. Rep. 296*, properly understood, is not inconsistent with this view. There the husband sued his wife for a decree of nullity by reason of her previous marriage contract with one Hoeger. The wife's

answer was twofold. *First*, that there had been no marriage with Hoeger, although she had lived with him in adultery and borne a child by him, and this was found as a fact by the vice-chancellor, and rendered any further observations unnecessary and *obiter*. The *second* defence set up by the wife was that at the time of the supposed marriage with Hoeger she had a former husband, one Hoffman, still living. The proof was that she was married to Hoffman and was living with him, and that he had run away by reason of having killed a boy in an accident only two or three years before her supposed marriage with Hoeger, but at least eight years before her marriage with the complainant. Diligent inquiry had been made for Hoffman, and clear proof was made in support of the second branch of the defendant's answer that he had not been heard from for more than seven years before she married the complainant. Under these circumstances, and especially as the complainant was well acquainted with them all before he married the defendant, the vice-chancellor refused relief. There it will be perceived that the death of Hoffman did come directly in question. The case is not authority for the position that if seven years after Mrs. Burkhardt's first husband, Hoffman, had absconded, and had not been during that time heard from, she had sued him for divorce on the ground of desertion, and it had incidentally appeared that she had not heard from him for seven years, the court would have denied her a decree.

It seems to me that the distinction between the two cases is clear enough, and that it is the duty of the court to grant relief in such cases and relieve the deserted spouse from an equivocal position. The references cited from Professor Bishop and the case of *Glass v. Glass* were not brought to the attention of the court in *Burkhardt v. Burkhardt*, and I take the liberty of saying that anything said by the court in that case in conflict with those authorities was not law, and was, as before remarked, mere *obiter*. It must be borne in mind that, in the absence of direct proof of death, the possibility of the life and return of the absent spouse exists, precisely as it did in the Massachusetts case; and if in this case the petitioner, relying upon a decree of dismissal entered upon the advice of the learned master, should marry again

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and bear children, and her former husband should return or actually be living, these children would occupy a most uncertain position in the matter of their legitimacy. For these reasons, I think that every consideration of public policy and common justice impels towards granting a divorce in this case.

If it be said that it is inconsistent with fundamental principles to grant a divorce against a dead man, the answer is twofold: *First*, there is no certainty, in the ordinary sense of that word, that the defendant is dead. The presumption arising from his long absence is but a presumption at best, adopted as a convenient and necessary substitution for proof in order to avoid a deadlock in business affairs. See *Best Ev.* §§ 408, 409. In the next place, a decree of divorce is peculiar, in that it is not in itself a decree or judgment *in personam*, although the ancillary remedy for alimony may be such. It is, in effect and substance, a judicial declaration of a status or condition. It declares that the parties are free and clear of the marriage relation. And certainly if the defendant be dead the petitioner is free and clear of the marriage relation, and the declaration or decree to that effect does him no harm. In all cases of divorce on account of desertion the real ground of the relief is that the defendant is dead as to the complainant or petitioner.

Finally, I feel quite sure that many divorces have been granted in this state on the ground of desertion, where the deserting spouse has not been heard of for more than seven years, and I am free to confess that the point taken by the learned master in this case is, so far as I am concerned, quite novel.

I will advise an order sustaining the exceptions and a decree of divorce.

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GENERAL PROPRIETORS OF EASTERN DIVISION OF NEW JERSEY

v.

WILLIAM M. FORCE'S EXECUTORS *et al.**

[Decided October Term, 1896.]

1. A resolution of the General Proprietors of the Eastern Division of New Jersey that no surveys to be made in right of a dividend declared by the proprietors should comprehend water, rivers, brooks or creeks, without including a proper quantity of land on each or either side thereof, is broad enough to cover a fresh-water lake.

2. A survey of land of the General Proprietors of the Eastern Division of New Jersey under a warrant passes no title as between the proprietors and its own officer, surveyor-general or register, unless approved by the council of proprietors, and if the survey and return be such that it is manifest that the council would not have approved them, and such that the officer in whose favor they were made could not have compelled the council by legal proceedings to approve them, the return, so far as regards that officer, cannot be held valid.

3. A return by the surveyor-general of the General Proprietors of the Eastern Division of New Jersey on a survey of a pond alone in three instances, two to himself, which surveys united in himself the offices of surveyor-general and register, and both of which surveys purported to include land as well as water, and which, so far as appears, may have been made clandestinely and without the consent of the proprietors, and the third to another, who was a large individual proprietor of which the same might be said, is insufficient to show a waiver of the rule of the proprietors that no survey of land under a pond by itself should be made without the express consent of the council.

4. An appointment of a deputy surveyor-general of land of the General Proprietors of the Eastern Division of New Jersey ought not to have been made without the approval of the council.

5. The General Proprietors of the Eastern Division of New Jersey were the legal owners of all unappropriated lands in East New Jersey against which were outstanding warrants of location. The proprietors claimed that they had the exclusive right to all of the lakes, and that they were not subject to be appropriated by ordinary outstanding warrants. The power of appropriating them to warrants rested in the surveyor-general and the register, but more particularly, perhaps, in the surveyor-general, who was the officer who, by long-settled practice of the proprietors, had the power to make a "survey" either in person or by a deputy at the

* This case was omitted from its proper place.—REP.

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request of a warrant-holder, and then to make a "return" to him, thereby appropriating a certain portion of the land to him in satisfaction of his warrant.—*Held*, that it was not competent for the surveyor-general and register, both of whom were also members of the executive committee of the council of proprietors, to make a survey and return on any lakes for their own benefit, and that such action was a clear breach of trust, from which they would not be permitted to take any benefit.

6. This was true, admitting that the holder of warrants had an absolute right to have them located on the lands of the General Proprietors of the Eastern Division of New Jersey.

7. The General Proprietors of the Eastern Division of New Jersey is a corporation, and the individual holders of the proprietary shares, though holding the legal title, are no more proper or necessary parties to a suit for an accounting and to recover the equitable title to lands than would be the individual stockholders in any other corporation.

8. If, on a bill by the General Proprietors of the Eastern Division of New Jersey for an accounting and to recover the equitable title to lands, the individual holders of the proprietary shares should be made parties, it would not be obligatory to make them parties complainant, but they might be made parties defendant, and, as such, would not be barred by the statute from testifying as to conversations or transactions had with the deceased defendant.

9. On a bill by the General Proprietors of the Eastern Division of New Jersey for an accounting and to recover title to lands, a paper found among defendant's private papers, and purporting to be a minute of the proceedings of the executive committee of the proprietors, was improperly admitted in evidence over the objection that it did not come from the possession of the complainant, and that there was no proof that it was ever adopted by the executive committee, or that it was the same which was read, if any was read, before the council of proprietors at a subsequent date.

10. Letters of one who was both the surveyor-general of the General Proprietors of the Eastern Division of New Jersey and a member of the executive committee, but whose duties did not authorize him to bind the proprietors except in matters of the actual survey and allotment of lands, are not admissible against the proprietors as to another matter.

11. One who contracted with the General Proprietors of the Eastern Division of New Jersey relative to hunting for vacant land and the sale thereof will not be permitted to claim under a construction of the resolution constituting the contract different from that which the proprietors were induced by his active efforts to put on it, or, at any rate, which with his acquiescence they did in fact put on it.

12. Under a resolution of the General Proprietors of the Eastern Division of New Jersey that the register proceed to have the records examined with a view to the locating and making sale of all unlocated lands, and that he should be entitled to compensation for such surveys to sixty per cent. of the lands so located or of the proceeds of sales thereof, the register was not entitled to commissions on a sale made before the adoption of the resolution.

13. No estoppel can arise against the General Proprietors of the Eastern Division of New Jersey because of acquiescence in an account presented under a resolution that the register proceed to have the records examined with a view to locating and making sale of unlocated lands, and that he should be entitled to compensation for such surveys to sixty per cent. of the lands located or of the proceeds of sales thereof, with an allowance for surveyors' fees that should not exceed twenty per cent. of the sum he might expend therefor on all sales made, where no irretrievable action has been taken by the register, based on the proprietors' silent acquiescence, and they acted as soon as they discovered the errors and ascertained their rights under the resolution.

14. Under the rule that the words of an instrument shall be taken most strongly against the party employing them, a resolution of the General Proprietors of the Eastern Division of New Jersey prepared by the register that the register proceed to have the records examined with a view to locating and making sale of all unlocated lands, and that he should be entitled to compensation for such surveys to sixty per cent. of the lands located or of the proceeds of sales thereof, with an allowance for surveyors' fees that should not exceed twenty per cent. of the sum he might expend therefor on all sales made, is confined to "unlocated lands," and casts the burden of expense in hunting for lands on the register, he to get back from the proprietors twenty per cent. of the sum expended.

15. One who appeals to a court of equity must do equity.

16. The measure of equitable damages which a *cestui que trust* is entitled to recover for a breach of trust is, at the option of the *cestui que trust*, the amount actually lost by the breach, or the amount which the trustee has gained thereby.

17. The liability to make good a loss resulting from a breach of trust participated in by more than one trustee is both joint and several, so that each trustee is liable for the whole loss.

18. The register of the General Proprietors of the Eastern Division of New Jersey and member of the executive committee is entitled to no compensation on a sale of land of the proprietors by him in breach of his duty to secure the best price he could get.

19. Three several methods of passing title to lands, in use for many years, by the Proprietors of East Jersey stated and explained. The *dictum* on that subject by the court in *Jennings v. Burnham*, 56 N. J. Law (27 Vr.) 289, commented on, doubted, and not followed.

On final hearing on pleadings and proofs.

The bill in this cause was filed on the 8th day of September, 1891, against William M. Force, the defendants' testator. It was based on the idea that the complainants, in their collective capacity, constituted a corporation capable of suing. On the 31st of October, 1891, the defendant, Force, interposed a plea set-

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ting up that the complainants were not a corporation. Force died, and the present defendants were made parties before this plea was brought to the test of a hearing. The order making them parties directed that they should proceed according to law and the rules of the court within thirty days after service upon them of a copy of the order, and that in case of their failing so to do, the complainants might cause their appearance to be entered, and the plea of the said William M. Force, previously put in, deemed and taken as their plea. The defendants thereupon, within the thirty days, filed a plea to the same effect as that previously filed by their testator. The cause was brought to a hearing on that plea on the 20th of June, 1892, and it was overruled. An appeal was taken from the order overruling it, and it was affirmed in June, 1893. The defendants then demurred to the bill, and, on motion, the demurrer was stricken out. The defendants then answered, and the cause was brought to hearing on the pleadings and proofs.

The complainant, as a corporation, is composed of all persons holding a proprietary right or interest, commonly called a "propriety," in the territory of East New Jersey. There are twenty-four of these proprietary rights, and they have been divided again into what are called quarter shares, and the holding of a one-quarter share, or a ninety-sixth share in the whole, entitles the holder to a seat in the council of the proprietors. This is a meeting held twice a year at their office in Perth Amboy, under a written agreement entered into between them in 1725, by which all agreed to be bound by the action of this council, provided one-third, or eight full shares, were represented, either in person or by proxy. The officers of this corporation are a surveyor-general, a register and a treasurer.

The defendants' testator, William M. Force, was for nine years, and during the period of the transactions brought here in question, the register of the complainants. While acting as such officer he received large sums of money, proceeds of sales of land of complainants, which he admitted were received on account of the complainants; he also received other sums of money, proceeds of such sales, which he did not admit he received on account of the complainants, but which they claim were or should

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have been received for their account; he also acquired the title to certain lands of complainants, which they claim he acquired wrongfully, and should be decreed to hold in trust for them.

The object of the bill is to call him to an account for these moneys, and to recover the equitable title of the lands in question.

With regard to the defence, it may be stated to be, generally, that the defendants claim that Mr. Force accounted in his lifetime to the complainants for all that was due them of the moneys which he admitted he received on their account, and, as to the other moneys, that they are not entitled to call on them to account for them, and the same as to the lands.

Mr. Force was register of the proprietors by annual election from 1881 to May, 1890, when he failed to be re-elected, and an investigation into the affairs of the complainants took place, which resulted in the commencement of this suit.

The case made, including the testimony of thirty-six witnesses and a large mass of documentary evidence, occupied fifteen days in its production. Counsel occupied five days in argument.

Mr. Richard V. Lindabury, for the complainants.

Mr. Frederic W. Ward and *Mr. Frederic W. Stevens*, for the defendants.

PITNEY, V. C.

In order to clearly understand the character of the issues it is worth while to advert briefly to the history of the complainants, their mode of conducting business, and the situation of their affairs at the time Mr. Force first became connected with them.

The complainants, as is well known, are successors in title to the original grantees of the executors of Sir George Carteret, of the eastern division of New Jersey. The twelve original grantees conveyed an equal undivided one-half to twelve other proprietors, and the property has ever since been held in shares of one-twenty-fourth each. In 1676 Sir George Carteret, and four other persons who were the grantees of Lord Berkeley, his original tenant in common of the whole province, entered into what is known in history as the *quinti-partite* deed (1 N. J. Arch. 205; *Leam.*

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& *Spi.* 61), by which they agreed to divide the Province of New Jersey into two parts by a line which was described as running from the northerly branch or part of the Delaware river, and the most northerly point or boundary of the whole tract, agreed upon and called the north partition point, and from thence southward by a straight line to the east side of Little Egg Harbor, which was fixed as the south partition point. This division line was finally established in 1743 by the running of what is called the Lawrence line, under an act of the legislature of 1719. *Allin. L. p. 43.*

Prior to the act of 1719, and the running of the Lawrence line thereunder, the true division line between East and West Jersey was, of course, unknown, and numerous surveys and returns had been made by the East Jersey Proprietors west of where it was finally established, and *vice versa* by the West Jersey Proprietors east of that line, and the object of the act of 1719 was not only to have the line run and established, but to settle and quiet all titles under the mixed surveys. In point of fact, all the southern and most of the western part of Morris county was located before 1719 and held under West Jersey patents or locations.

George Keith, on the part of the East Jersey Proprietors, had previously, in 1687, run a line from Little Egg Harbor northwesterly as far as the Raritan river, the course of which line was farther west than the Lawrence line, and which Keith line now forms the boundary between Burlington and Ocean counties. The wedge-shaped piece formed by this line and that of Lawrence has been called the "gore." The Lawrence line crossed the Delaware river at its present terminus, and ran into and across Pennsylvania to a point on the Delaware at latitude forty-one degrees and forty minutes north, which was then the recognized northerly point of the province. This northerly point was subsequently, in 1769, fixed at the rock on Carpenter's Point, at the mouth of the Navesink river, considerably farther south and east of the original terminus of the Lawrence line. This change of boundary between New York and New Jersey led to a claim by the West Jersey Proprietors for a relocation of the division line, and, though no line was ever run in accordance with this claim, a second gore was claimed east of the Lawrence line at its south-

erly end, and some locations of land were made as late as the beginning of this century east of the Lawrence line in Ocean (then Monmouth) county, under West Jersey warrants. The Lawrence line, however, was finally determined to be the true line of the division, in the case of *Cornelius v. Giberson*, 25 N. J. Law (1 Dutch.) 1.

The usual mode adopted by the proprietors for passing title, after the surrender of governmental powers, was by issuing warrants or rights of location, which entitled the holder to have a certain number of acres set off to him in severalty wherever he might choose to locate them, if the warrant of location was general and unrestricted. In some instances, however, it was restricted to certain localities. These warrants of location, which came to be called simply "warrants" or "rights," were usually issued by way of dividends to each of the proprietors according to the amount of his holding, and when issued were credited to the proprietor on a book called the warrant-book, and as often as any land was located under them the party who had credit for so many acres was charged with the amount actually located. The fact that the most usual occasion of issuing these warrants was by way of dividends among the proprietors resulted in the process being termed by the courts a mode of partition among the proprietors. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 11; *Den v. Sharp*, 4 Wash. C. C. 609; *Baeder v. Jennings*, 40 Fed. Rep. 199; *Estell v. Land Company*, 35 N. J. Law (6 Vr.) 235; *Jennings v. Burnham*, 56 N. J. Law (27 Vr.) 289.

This making dividends among the proprietors was not, however, the only occasion when they issued warrants of location. The records, since 1760 at least, show a great number of instances, one as late as 1859, where warrants were issued directly to outside parties, not proprietors, on sale by the proprietors, at auction or otherwise, for a moneyed consideration. The proprietors sometimes put up at auction for sale general warrants of location, and sometimes made such sales without auction. On other occasions they sold particular tracts of land to outside parties by private contract, and in such case the machinery adopted was to issue a general warrant of location for a large number of acres to one or more trus-

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tees to hold in trust for the proprietors, and then direct the trustee to have a certificate of survey and return made in the usual way to the trustee, and a deed by him to the purchaser of the particular tract of land. In other words, the mode adopted of issuing a warrant to Charles E. Noble, trustee for the proprietors, under consideration in *Jennings v. Burnham*, 56 N. J. Law (27 Vr.) 289, was one which had been in use by the proprietors on many occasions for a long period of years, and numerous titles in this division of the state depend upon them. In fact, the warrant of location for ten thousand acres under which the plaintiff claimed in *Cornelius v. Giberson*, 25 N. J. Law (1 Dutch.) 1, was issued to Newell, DeBow and Brinley, in trust for the proprietors (25 N. J. Law (1 Dutch.) 2; *Minutes Council of Proprietors B. 308*), and received the approval of the supreme court. I must therefore presume that if the custom just mentioned had been proven in the case of *Jennings v. Burnham*, and the attention of the court called to the decision in the case of *Cornelius v. Giberson*, the title held under Noble would have received the approval of the court. For it must be observed that the mode of severing titles by partition, which was approved in the line of cases first referred to, is one resting entirely in the custom of the proprietors, and is not in accordance with the course of the common law. It has, indeed, been finally recognized by our courts without proof, but it must, originally, have been proven in the courts in the same manner as any other local custom must be proven.

While on this topic I cannot refrain from saying that owing to the fact that a large part of the land in the northern part of New Jersey is wooded, mountainous and unenclosed, it has frequently been necessary in suits of ejectment or trespass involving title, in the northern counties, to trace the title back to the proprietors, and I have never heard the point taken that it was necessary in so tracing title to prove that the person to whom the warrant of location was issued was one of the proprietors, but counsel and parties always, according to my recollection, relied simply upon the production of a "survey" and "return" under a warrant to whomsoever issued as being sufficient to pass the title.

The third section of the act of 1787 (*Rev. 1877 p. 599; Gen. Stat. p. 1972 § 3*) seems to dispense with any proof of that sort.

Besides, these warrants of location were assignable, and were, in fact, frequently assigned by the original warrantee to other persons not holders of any proprietary right, and such deed of assignment was made independent of their proprietary rights, and did not affect the same.

In the case in hand, as will hereafter appear, the custom to which I have referred is fully proven, and also the fact that Mr. Noble was one of the proprietors at the time of the issuing of the warrant in question, and I shall therefore hold, for present purposes, that titles made under his warrant are good.

In addition to the method of making title by locations under warrants, the proprietors also, on many occasions, made title by direct conveyance, executed by their president, under their seal, and numerous titles are held under such conveyances.

The records at Perth Amboy show that, in addition to divers sales of land made in the manner just stated, there have been fourteen regular dividends made among the proprietors in proportion to the amount of their several interests, the last one being made on the 20th of May, 1856. For these dividends warrants of location were issued and were transferred by deed from the original proprietors to other parties and became a matter of merchandise, and, under them and other warrants and direct conveyances, practically all the land of any value in East Jersey subject to location had been located, so that, prior to 1870, warrants were selling at from thirty-five to fifty cents an acre, and about 1879 there were outstanding warrants for thirty-five hundred acres, the ownership of which, in general, is to be found and ascertained only on the books in the office at Perth Amboy.

There were, however, considerable tracts of land on the sandy beach or islands along the shore, separated from the mainland by inland waters, which it was known by the proprietors generally had not been located. These had, in the main, been considered not worth locating. A part of these shore or beach lands was covered by two or three large patents or locations—notably that of Daniel Coxe, under consideration, in *Baeder v. Jennings*,

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40 Fed. Rep. 199, and in *Burnham v. Jennings*, *supra*—the validity of which was disputed by the proprietors.

In addition, there were to be found through the unenclosed, wooded and mountainous regions of Morris, Sussex and Passaic counties, little irregular-shaped pieces and strips of land of little value, which had been omitted in the location of the larger tracts owing to the irregular shape of the actual locations. These had been, from time to time, hunted up and located by the old surveyors of those counties and had become very rare. There were, in addition, several small inland fresh-water lakes, which had never been located properly under warrants. This was due at first to the fact that they were considered of no value and not worth expending warrants of location upon, and, later on, to the settled policy of the council of proprietors, shown by a series of resolutions adopted by them, the last and most emphatic in 1871, and by instructions to the deputy surveyors, "not to locate any warrants upon ponds or beach or shore property;" and prior to and about the time when Mr. Force became register, the council of proprietors had offered for sale, and had actually sold, several of these lakes and received a large consideration in money therefor. In one instance they compelled a party, who had located one of these lakes under general warrants, to pay them a sum in cash for a confirmatory release. These lakes began to appreciate in value about the year 1870, so that by the acre they were worth many times more than the selling price by the acre of warrants of location. This was due to the fact that the holders of the warrants appreciated the situation, and the deputy surveyors were forbidden to locate general warrants on natural ponds and lakes.

It may be worth while here to notice briefly the mode of locating land under a warrant of location. The owner of the warrant having chosen his land, applies to the surveyor-general to survey it for him, but as it was impracticable for the surveyor-general in person to make all these surveys, the practice has been from early times for that officer to appoint in various parts of the domain deputy surveyors, and then for the holder of the warrant to go to one of these deputy surveyors and employ him to actually survey the land, and then to "certify that at the request of the

warrant-holder he had surveyed the land," giving its metes and bounds and contents, with a map and computation of contents annexed, and send that certificate to the surveyor-general. That paper, though, strictly speaking, a certificate of survey, came to be called simply a "survey." Then the surveyor-general, having examined the document and verified the accuracy of the survey and computation, made a certificate, which is called a "return," of the land so surveyed to the holder of the warrant, and handed that to the register, who charged the number of acres contained in it against the account of the holder of the warrant on the warrant-books of the proprietors. In order to validate this proceeding of the surveyor-general, his work should be approved by the proprietors in council assembled, and when so approved and the certificate recorded and handed to the holder of the warrant, the title to that land became vested in him.

I come now to the facts of this case.

At the semi-annual meeting of the council of proprietors in May, 1877, Professor George H. Cook, of New Brunswick, appeared as the owner of one-quarter of a share, and took his seat as such in the council.

At the next semi-annual meeting William M. Force was admitted to a seat in the board as the owner of a sufficient share of "propriety," as it is called. At that time Monroe Howell was surveyor-general and J. Lawrence Boggs was register.

Shortly before that an old map of the Lawrence line had been found, which enabled its true location to be traced with certainty, and action had been taken by the council for hunting up vacant lands in Monmouth and Ocean counties, and also with a view to test the title of parties holding under West Jersey locations east of the Lawrence line.

Shortly after Messrs. Cook and Force took their seats in the council moneys were appropriated for surveys in Ocean and Monmouth counties, and maps of surveys of land in Ocean county were made and presented, and applications for the purchase of lands were made and referred to the president, with the surveyor-general and register, and measures were taken to have plottings and surveys made to hunt for vacant land, and in 1879 a resolution was passed "*that the surveyor-general be ordered to make no*

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returns on individual rights of lands heretofore surveyed at the expense of the board [council],” and at that time, 1879, a permanent executive committee was appointed, composed of the surveyor-general (Mr. Howell) and Messrs. Force and Charles E. Noble, who had recently taken his seat in the council.

About this time (1879) Professor Cook and Mr. Force manifested great interest in the affairs of the proprietors, and considerable activity in promoting their interests, and were, together with a Mr. Russell, who, the evidence shows, was acting in concert with them, appointed on several committees of investigation. One was a committee to investigate and report as to the rights of the proprietors to lands under water; another on rules and regulations; one on tidewater lands, and one on books and papers. In each of these capacities they made separate and quite lengthy written reports. The one on rules and regulations reported eight rules, the seventh of which was

“that the owners, heirs, executors, administrators and assigns of all such proprietors having dividends of rights of locations unsatisfied shall have the same rights and privileges, force and effect, as when such dividend was previously originally declared and recorded, and that all resolutions to the contrary be rescinded.”

These rules were adopted by the council, and the significance of the one just quoted will appear in connection with the fact, developed at the hearing, that at and about that time Mr. Force, having, as a proprietor and member of the committee on books and papers, access to the records of the proprietors, had ascertained the ownership of the different outstanding warrants of location, and was engaged in buying them up, having the title made partly to Professor Cook, partly to Mr. Russell and partly to himself, and, in the main, at his own expense.

The effect of the rule just referred to would be to revoke the resolution of 1871, refusing to make surveys on ponds or beach or shore properties on individual rights, and that of 1879, that no warrants on individual rights be laid on lands heretofore surveyed at the expense of the board.

Another of the rules and regulations so reported was as follows:

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"Resolved, That an executive committee of not more than three members be appointed or chosen who may, during the intervals between the meetings of the board, have charge of its interests, with full power, under the established rules, to make negotiations, sales and contracts in the interest of the board of proprietors, jointly or otherwise."

The surveyor-general (Mr. Howell), Mr. Force and Mr. Noble were appointed on that committee, and Mr. Force acted as its clerk. Later on, the president of the council and the surveyor-general, for the time being, were made permanent members, and in that way the committee was raised in numbers to five.

From that time the executive committee took charge of all the affairs of the proprietors, and transacted all their business, and to it was particularly committed, by divers resolutions, the sales of all lands under water, and the different sales presently to be mentioned were negotiated by it. No record of its meetings or actions was entered in any separate book, but whatever original record now exists is in the shape of memoranda in Mr. Force's handwriting on loose slips of paper. At each semi-annual meeting of the council that committee made a report, apparently in writing, which included divers resolutions adopted by the committee, and when those resolutions were approved by the council they were written out at length in the minutes of the council by Mr. Force as register.

In 1880 the council ordered a deed to be made to Mrs. Truesdell for Decker pond, in Sussex county, at \$10 an acre, and for Three-cornered pond (Lake Como), Ocean county, to another party for \$2,000. At the same time the executive committee reported as follows:

"Your committee would respectfully report that at an early day after their appointment they made examinations of the beach lands lying south of Point Pleasant, in company with S. S. Osborn, deputy surveyor, and became satisfied that there was a field open for profit to the proprietors in unappropriated lands, and more especially so from the improvements the new land association have in contemplation, as well as the early extension of the railroad. The deputy surveyor assured your committee that at an early day buyers would make distinct proposals for purchases to the extent of from \$8,000 to \$10,000, as he had been assured by them. Certain of these lands have been surveyed and are ready for a return to be made for them to the board of proprietors."

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The committee appear also to have ordered a search as to the title of lands at Point Pleasant, which is the northerly end of the beach which separates Barnegat bay from the ocean. Also as to the rights of the proprietors in Lake Hopatcong, Stanhope reservoir, &c.

In 1881 the executive committee offered at public sale, and sold Shark river on the coast, and Lake Hopatcong (Brookland pond), Culver's pond and Quick's pond, all in Sussex county. In May, 1881, Mr. Force was elected register in the place of J. Lawrence Boggs, and John Kean, Jr., was elected treasurer. John W. Russell resigned as a member of the executive committee, and made a written offer to prosecute on behalf of the proprietors the recovery of lands mainly under water, in the neighborhood of New York harbor near Sandy Hook. His offer was accepted, and the contract under which he was to make the prosecution was approved by the executive committee, of which Mr. Force was a member. That prosecution was undoubtedly undertaken on behalf of himself, Mr. Force and Professor Cook, and the president, Force, Professor Cook, Surveyor-General Howell and Mr. Noble were appointed a committee to frame the contract with Russell and to employ counsel to assist them therein.

In 1881 the surveyor-general was authorized to cause surveys of all lands about Ocean Beach, Monmouth county, and in May, 1882, the council directed that notice should be published in the newspapers of the intention of the proprietors to survey all their lands. At that time Mr. Noble was elected president; Mr. Howell continued as surveyor-general and Mr. Force as register.

At that time Professor Cook, Mr. Howell and Mr. Force, as a committee, made a written report on ancient patents, and, in addition, Professor Cook made an oral report, in which he stated, according to the minutes, that the famous Coxe patent had never been granted, and that the council of proprietors owned the lands covered by it, and he (Professor Cook) and Mr. Force were made a committee with power to make settlement with all claimants of lands under those patents. The written report dealt with several patents or locations on the beach lands, com-

mencing with the Coxe patent at Little Egg Harbor, dealing with that, and the Sonmans, the Barker, the Burnett and the Gordon patents.

It will be seen hereafter that all these matters have an important bearing on the issues to be determined.

In May, 1883, Professor Cook was appointed surveyor-general and became one of the executive committee.

In the meantime Mr. Force, Professor Cook and Mr. Russell had purchased about nineteen hundred acres of warrants of location, and expended a large portion of them in a "survey" and "return" of lands on Sandy Hook, which they claimed had never been surveyed and sold to the government, but they failed to have their title recognized by the government, and their investment was nearly or quite a total loss.

We now approach the matters in controversy between the parties. The evidence, oral and documentary, shows that at this time Professor Cook and Mr. Force had acquired the confidence of the council of proprietors, and had induced them to believe that they could obtain for them and for their benefit valuable lands from three or four sources: *First*, lands along the coast which had never been located; *second*, lands in that neighborhood that had been located under invalid locations, like that of Coxe, Gordon and others; *third*, unenclosed lands in Morris and Sussex counties, which had been located under West Jersey warrants east of the Lawrence line; and *fourth*, lands that had never been located in Morris and Sussex counties; and the council had gone to considerable expense, at the suggestion of those gentlemen, in making maps and surveys by way of hunting for and locating these lands, particularly those in Morris and Sussex counties. The whole work was put in charge of Professor Cook, as surveyor-general, and he was authorized to expend what moneys were necessary for that purpose.

The proprietors were then possessed of a considerable fund, the result of previous sales of lands and lakes.

It is clear that at this time the proprietors claimed that all lands covered by water, whether fresh or salt, including the fresh-water lakes of northern New Jersey, belonging to them,

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were not subject to location under general warrants in favor of private persons, but had been put in the hands of the executive committee to be sold by them for the benefit of the proprietors.

Some time, not later than the early part of the month of April, 1883, a Mr. Grinnell Burt, who was an officer, or in some way interested in the management of the Lehigh and Hudson railway (running from the Delaware at Belvidere, northeasterly, up the valley of the Pequest, across the divide between the Pequest and Wallkill, thence down the Wallkill to the Hudson), applied to Mr. Noble, who was then president of the council and *ex officio* member of the executive committee, to purchase from the council a small lake called Lane's pond, but afterwards known as Grinnell lake, situate by the side of his railway in Sussex county. Mr. Noble directed him to have a survey made and to hand it to him (Noble). Mr. Burt employed George M. Ryerson, of Newton, a deputy surveyor, to make the necessary certificate of survey and map. This Mr. Ryerson did, and Mr. Burt handed it to Mr. Noble. It is possible, though judging from Mr. Ryerson's method not probable, that this original descriptive survey was not in a proper shape to be certified to by the deputy surveyor and sent to the surveyor-general, but it seems to be sufficiently certain that it contained the metes and bounds of the unappropriated lands lying under the lake, and a proper map. The actual survey on the ground, if any, was made on the 27th of April. Just previous to a meeting of the executive committee held on the 8th of May, Mr. Noble presented it to Professor Cook and Mr. Force, informing them that Mr. Burt wished to purchase that lake, and Mr. Force presented it to the executive committee. Some discussion arose upon it, whereupon Mr. Amos Clark, one of the committee, proposed that they should sell it for \$1,000. So far for the oral evidence.

Among the papers in the handwriting of Mr. Force, found by the officers of the proprietors after his retirement from the office of register, were the rough minutes of that meeting of the 8th of May, 1883. The part of it relating to the survey of Lake Grinnell is as follows:

"Survey presented by the president, Mr. Noble, of Lane's pond. Mr. Lord moved that we sell Lane's pond for one thousand dollars upon the filing of a proper survey. Approved."

The council of proprietors met seven days later, on the 15th, its regular spring meeting (when Professor Cook was elected surveyor-general), and the proceedings of the executive committee of May 8th, as reported and entered by Mr. Force with regard to this pond, are as follows:

"Mr. Noble presented a memorandum of lands covered by what is called Lane's pond, in Sussex county, and supposed to be unlocated. On motion of Mr. Lord, this was left for further information, to be obtained from the president, of location, value, &c., *in the proprietors' interest.*"

It thus appears that the original minute made by Mr. Force, at or about the 8th of May, was not reported, but the minute which was reported to the proprietors in council, and which was approved by council, clearly indicated that the executive committee and the council understood that this lake was to be dealt with by the committee as the property of the proprietors, and not subject to location under private rights.

About that time one McCoy, an old surveyor of Sussex county, but not a deputy, cast about him with a view of getting control of, by location under general warrants, several lakes in Sussex county, including Lane's pond. His experience as a surveyor and notes of his field work enabled him, by plotting, to ascertain just which ones had and had not been located, and he had discovered that Lane's pond had not been located. He took into his counsel one William S. Vanderhoff, an insurance and real estate broker, and Mr. Howard Little, who was a real estate dealer, and they concluded to take in with them one Stanton, the publisher of a newspaper in the neighborhood where they all lived, namely, Deckertown, in Sussex county. Mr. McCoy had a survey and map of Lane's pond, much like that made by Mr. Ryerson, the result of merely plotting other well-known tracts together and showing the vacancy. In point of fact, this had been the method adopted for years by deputy surveyors of making what were supposed to be, in theory, actual surveys; they pieced out neighboring surveys and demonstrated, by what may

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be called the exclusive process, the existence of the vacant land, and made a certificate of a survey of it to the surveyor-general without ever having gone on the land.

These four gentlemen then began to cast about for rights of location, which, at this time, had become scarce as the result of the previous purchases made by Mr. Force before mentioned; and Mr. Little, who had previous acquaintance and some business transactions with Mr. Force, suggested that they apply to him; whereupon he, Little, did apply to Mr. Force some time just about the date of the meeting of the executive committee of May 8th, 1883. The result of that application was that Mr. Force agreed to join in the enterprise, and Mr. William Roome, living at Pequannock, in Morris county, an experienced surveyor, but not a deputy, who had been previously employed by the council in field work, and whose father, Benjamin Roome, then at an advanced age, had been a deputy surveyor for forty years, was employed to procure the necessary certificate of survey. Under date of the 27th of June, 1883, Mr. Benjamin Roome sent to the office at Perth Amboy a formal certificate of a survey of Lake Grinnell, purporting to include thirty-nine acres and three-hundredths of an acre. The survey of Mr. Ryerson contained thirty-six acres and seventy-one-hundredths of an acre. They do not, however, coincide in their boundaries, and each include several acres not included in the other. Both of these surveys purport, in whole or in part, to be the result of an actual survey on the ground. Only that of Ryerson was, so far as appears, the result of actual survey, and that only partial, by Mr. Caldwell, an employe of Burt. Mr. Roome's survey was made up from McCoy's plotting. But the indications are that Ryerson's original survey and map, which were before the executive committee on the 8th of May, 1883, were handed to Professor Cook and by him sent to Ryerson, resulting in a formal certificate of survey made by Ryerson as deputy surveyor, which is addressed by him to George H. Cook, surveyor-general of East New Jersey, and commences in the usual form, "I have surveyed for the council of proprietors of East New Jersey, at the request of Grinnell Burt, all that tract of unappropriated land," &c., and ends in this way:

"Bounded on all sides by prior locations, and the adjoining owners are aware that it is about to be located. A map of which survey and computation of its contents are herewith delivered to you. Survey made the 27th day of April, 1883. Chain-bearers were Andrew H. Konkle and Chas. Caldwell. Survey sent to surveyor-general September 3d, 1883. George M. Ryerson, Deputy Surveyor of East New Jersey."

The date "3" is erased and "14" written over it in different handwriting. That paper is endorsed by William M. Force, register, as filed September 14th, 1883, and also in the handwriting of Professor Cook, "September 14, 1883, George H. Cook, surveyor-general." A map and computation were annexed to it, of which we have a copy, but not the original.

The formal survey made by Mr. Roome was filed on the 27th of June, 1883, by William M. Force, register.

The correspondence between Professor Cook and Mr. Force indicates that Professor Cook, who was elected surveyor-general at the May meeting of the council, sent the Ryerson survey back to him to be put in proper shape and certified (but I doubt if it needed any correction in that respect), and that Mr. Ryerson, owing to illness, was unable to perform that duty until September. In the meantime the McCoy party got their survey recognized by Mr. Force, as deputy surveyor-general. The correspondence indicates that Professor Cook was not aware that Mr. Force was interested in engineering the successful survey.

Force entered into the agreement with McCoy and his associates to locate the lake on rights of location to be furnished by him (Force), and Mr. McCoy was to be paid for his services. Mr. Force was to be allowed for the rights of location, the property was to be put upon the market, and the profits equally divided. In pursuance of that arrangement Mr. Force prepared a formal "return," corresponding with the formal "survey" of Roome. By that return he certified, as deputy surveyor-general, that Roome had surveyed for John J. Stanton the lake by metes and bounds, containing thirty-nine acres and three-hundredths,

"to which tract and land and waters the said John J. Stanton hath right in part of a deed to him from Henry H. Yard, for 40 acres, as recorded in A. B. 12, p. 59."

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Yard obtained his warrants from the heirs of Joseph E. Edsall, whose warrants were issued under the fourteenth dividend of 1856.

Professor Cook wrote to Mr. Force, under date of June 28th, in answer to a previous inquiry by Force, to the effect "that he should not wish to locate his warrants while surveyor-general," and preferred selling them to some one who would locate them and give him half the proceeds, or he was willing to sell them outright. This letter probably furnishes the explanation of the fact that the warrants were not taken from Professor Cook's account. How Force settled with Yard does not appear. Stanton conveyed one-fifth to Little, one-fifth to McCoy, one-fifth to Vanderhoff and one-fifth to Force. Afterwards these persons, directly or indirectly, conveyed the whole to Force. Force bought an additional strip of land by the side of the lake of one Kongleton for \$150. and then conveyed to the Knickerbocker Ice Company for \$3,000 the small piece of land he had bought of Kongleton, and the perpetual right to cut and harvest and remove ice from the waters of Lake Grinnell, as such waters were conveyed to him by Stanton and others. This \$3,000 he received in cash, and he subsequently conveyed the fee of the lake to Grinnell Burt for a named consideration of \$500.

It is alleged by the defence, and I assume it to be proven, that nothing was paid in cash by Burt, but it appears that he complained to Little and Force that he had been defeated in his straightforward attempt to purchase the lake in the usual way from the proprietors, and it was prudent to placate him: and further, in order to make the sale of the ice right to the Knickerbocker Ice Company, it was necessary to obtain through Mr. Burt a favorable freight rate for ice from that point to Philadelphia by Mr. Burt's railway. Mr. Force was obliged to pay divers sums of money to his associates, so that only a part of the \$3,000 was profit.

The complainants claim both sums, viz., \$500 expressed as the consideration in the deed and \$3,000 received from the ice company.

The complainants rely—*first*, upon the right of the proprietors to hold this lake free from the liability to be located under out-

standing warrants; and *second*, upon the position of the defendant, Force, as a member of the executive committee, charged with the duties accepted by him of selling these lakes on account and for the benefit of the proprietors; so that whether the rules and regulations of the proprietors, which prevented the location of these lakes under general warrants were valid or not, yet that the relations of Mr. Force to the proprietors were such that it was not competent for him for his own benefit to locate, under any outstanding warrants, these lands, as against the proprietors. They also rely upon the fact that the actual return was signed by him as deputy surveyor-general, without any proper authority from the surveyor-general, and that the survey and return were never approved by the council of proprietors.

The defendants put themselves upon the ground that Mr. Force was regularly appointed deputy surveyor-general; that an approval of the council of proprietors was not necessary, and that the right of Joseph E. Edsall, under his warrant, transferred to Yard, and by him to Stanton, was a vested right which could not be taken away by any action of the proprietors, by way of resolution or otherwise.

The defendants further claim that the last (fourteenth) dividend, under which these forty acres of rights of location which were expended in this lake had their origin, was unrestricted in its terms, and therein different from the previous dividends, and that any subsequent limitations put upon it were ineffectual, and if effectual, were removed by the seventh rule, adopted in 1879, previously quoted.

This leads me to state, what I omitted in its proper connection, that in making the eighth dividend, in 1813, the council resolved as follows:

"That all surveys to be made in right of above dividend to be subject to the following rules and orders: * * * 5th. That no long or narrow surveys be made including meadows or swamps, or *any other survey whatever comprehending water*, rivers, brooks or creeks, without including a proper quantity of land on each or either side thereof, unless there shall be a particular order from the proprietors for the purpose."

A like restriction had been placed on the seventh dividend, made in 1809. The ninth, 1818; the tenth, 1823; the eleventh,

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1828; the twelfth, 1834, and thirteenth, 1838, were all declared to be made subject to the same rules and regulations. The fourteenth dividend, May 20th, 1856, seems to have been made with very little formality, on the recommendation of the surveyor-general, Mr. Brinley, who was also register, and who recorded it thus:

"Whereupon it was agreed by the board that such dividend be declared, and the president appointed Messrs. William Paterson, Watson and Blauvelt a committee to examine the status of claims when the board adjourned."

It is worthy of note here that no meeting of the council between that time and 1859 seems to have taken place. It was usual for the minutes of the previous meeting to be read over in the presence of the next meeting, and, when approved by them, to be signed by the president, whoever he might be, of the approving meeting, and in the case in hand this took place in 1859.

It is argued by the counsel of defendants, in the first place, that the language of the restrictions of 1813 is not broad enough to cover a fresh-water lake. In this I cannot agree with them. I think it is, on its face, broad enough, and was intended to cover fresh-water lakes, and the subsequent conduct of the council in that regard is proof of the understanding that the council had of it.

It is further argued that the failure to place any restrictions on the fourteenth dividend gave the holders of warrants under that dividend a vested right to locate their warrants on any property of the proprietors, and that it was not competent for the proprietors to interfere with that vested right by any subsequent resolution or action.

In answer to that position it was argued by the complainants that the holder of a warrant of location had no vested right in any particular land until he had actually made his survey and secured his return, and that it was always in the power of the proprietors, at any time before a particular piece of land had been appropriated, and after a reasonable time for that purpose had elapsed, to withdraw it from the right of location, and this was argued to be *res adjudicata* in this state, as evidenced by an entry on the minutes of the council of proprietors, in 1769, in

the case of Lord Drummond (Earl of Perth), who applied to the supreme court for a *mandamus* to compel the surveyor-general to approve a return and survey which he had had made of a large tract of land, in which the supreme court declined to grant the *mandamus*, on the ground "that the council of proprietors had the power at any time to vacate warrants before returns were made thereon," and that the power to vacate warrants included the power to restrict their location. It was further urged that warrants of location more than twenty years old should be considered as barred.

With regard to the lack of any formal approval of this survey by the council it was argued by the defendants that it was not necessary, and resort was had to a thorough examination of the records of the council to show that it had not been the practice in all cases to have such returns approved, but only in cases of caveats or other special cases.

In answer to that, counsel for complainants referred to the decided cases which tend to show that in all cases such approval must in theory be had, and relied for that position upon what was said by Chief-Justice Kirkpatrick in *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 11, 68, 69, and by Justice Washington in *Den v. Sharp*, 4 Wash. C. C. 609, where, speaking of a survey and return (at p. 615) he says: "This was to be effected by warrant and survey duly made and returned, *approved by the council of proprietors* and recorded." And again (at p. 618), where he says: "It is admitted on all hands that the survey passes no title whatever *unless it be approved by the council of proprietors* in order to be recorded, but when this is done we have the authority of the late Chief-Justice Kirkpatrick in saying that the title relates back to the survey." Examination of the arguments of counsel in that case, as reported by Judge Washington, shows that he was right in his statement of the admissions of counsel, and those counsel were L. Q. C. Elmer, Garret D. Wall, L. H. Stockton, Richard Stockton and William N. Jeffers. And here the language of the third section of the act of 1787, before referred to, is significant: "Any survey made of any lands * * * and inspected and *approved of* by the general proprie-

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tors or council of proprietors, * * * and by their order or direction entered on record," &c.

And further, counsel here argued that where it has been held that it was not necessary to show affirmatively that the survey had been approved by the council, it was put on the ground that it must be presumed that it had been so approved in the regular course of business, and that the proprietors were estopped, in favor of innocent grantees and purchasers, from setting up that a survey and return which had been made and certified by the surveyor-general and duly recorded had not been approved by the council. See per Justice Bradley, in *Baeder v. Jennings*, 40 *Fed. Rep.* 203, 204.

This position, I think, is well taken, and that while most of the surveys have not been formally approved, yet that their validity, in the hands of *bona fide* purchasers and parties other than one of the officers of the council, depends upon the doctrine just stated, and that as between the council and its own officer—surveyor-general or register—the rule that the approval of the council is necessary applies, and that if the survey and return be such that it is manifest that the council would not have approved them, and such that the officer in whose favor they were made could not have compelled the council by legal proceedings to approve them, the return, so far as regards that officer, cannot be held to be valid.

Both parties relied on the practice of the surveyor-general and the action of the council in former years.

Complainant claimed that no survey of land under a pond, by itself, had ever been made without the express consent of the council, and pointed to instances where such surveys had been refused a return, and also to the fact that the council had claimed and exercised the exclusive right to sell these ponds. On the other hand, the defendants pointed to three instances in which the surveyor-general had returned warrants upon such ponds. The first is one by Francis W. Brinley, surveyor-general, to himself, of Hall's pond, in Sussex county, October 30th, 1854; another by Francis W. Brinley, surveyor-general, to himself, of Struble's pond, dated the 7th of May, 1855, and the third is one of Francis W. Brinley, surveyor-general, to Andrew B. Cobb, of

a portion of Green pond, in Morris county, dated 11th of August, 1856. It is to be observed of the first two of these surveys that Brinley united in himself the offices of surveyor-general and register; that they both purport to include land as well as water, and whether they do or not, it is to be observed that, so far as appears, they may have been made clandestinely and without the consent of the proprietors. Whether or not they would have stood the test of criticism by the council does not appear. The same may be said of the third, made to Mr. Andrew B. Cobb, who was a large individual proprietor. I am unable to see how these instances can be held to establish a general waiver by the proprietors of the right they claim in the premises. And with regard to the minute of the fourteenth dividend entered by Mr. Brinley, and the practice of that gentleman as surveyor-general and register, we find in Mr. Force's letters serious charges against him of dishonest practices whereby he had fraudulently obtained large tracts of land belonging to the proprietors and applied their proceeds to his own use, making use of his offices for that purpose. So that it hardly lies in Mr. Force's mouth to cite that gentleman's action as a precedent.

With regard to the right of Mr. Force to act as deputy surveyor-general, which was challenged, I find in point of fact that there was probably some sort of deputation made by Professor Cook to him, and that it was probably in writing, but the character and form of it does not appear. Nor does it appear, as I think it ought to appear, that such deputation was ever approved by the council. I come to the conclusion that so important a matter as the appointment of a deputy surveyor-general ought not to have been made without the express approval of the council.

But here again, if the return had been made by a person assuming to act without authority as deputy surveyor-general in favor of a third and innocent party holding valid warrants of location, I should think that, in favor of such a third innocent party, the title would have passed, and I think here that inasmuch as the title has finally passed to the Knickerbocker Ice Company and Mr. Grinnell Burt, who, so far as appears, paid for it in good faith, relying on the return and survey, the title

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did pass as against the proprietors, and indeed the complainants' case, so far as Grinnell lake is concerned, rests upon that basis. Hence the sole question is whether or not Mr. Force, in view of his relations to the board, had the right to assist McCoy, Little, Vanderhoff and Stanton in procuring this title in the manner that he did and to reap the personal benefit that he did from the transaction.

But before expressing the final result to which I have arrived on those questions, I will proceed to consider two or three other similar cases brought forward by complainants.

Mr. Force discovered that the surveys of Ryerson and Roome of Lake Grinnell each included some land that the other omitted, and about a year later procured Mr. A. P. Irons, a deputy surveyor, living at Toms River, to make a third certificate of survey from the plottings and surveys of Ryerson and Roome, already in hand, and the old adjoining surveys. By his "survey" Mr. Irons took in forty-seven acres and eight hundredths of an acre, and after deducting the survey to Stanton there remained eight acres and seven hundred and seventy thousandths of an acre. That certificate of survey is dated June 4th, 1884, and is addressed to George H. Cook, surveyor-general. It is marked "filed June 4th, 1884," by William M. Force, register. It purports to have been surveyed "for the council of proprietors of the eastern division of New Jersey." After those words there is interlined, in the handwriting of Mr. Force, these words: "At the request of William M. Force." The endorsement, in Mr. Force's handwriting, is in these words: "Survey of lands, township of Sparta, county of Sussex, at the request of William M. Force," the words "of William M. Force" being written at a different time from the remainder of the words and over a pencil erasure. On that "survey" Mr. Force made a "return" to himself by virtue of warrants of location which he had purchased from Benjamin and William Roome, and which they had purchased from John Rutherford, formerly president of the council, and signed it "William M. Force, deputy surveyor-general." The original is not produced, and the foregoing is taken from a copy taken from the clerk's office in Sussex county, where the original appears to have been recorded.

The eight acres so returned to Mr. Force were included in and conveyed by the deed to Burt, and formed a part of the land so conveyed to him.

Just up stream from Lake Grinnell, and very near to it, is a small lake called Upper White pond. At the same time that Mr. Benjamin Roome certified to the survey of Lake Grinnell, to wit, June 27th, 1883, he also certified to a survey of Upper White, as it was called, and the chain bearers were James W. McCoy and William Roome. By this paper Mr. Roome certified that he "did survey for William S. Vanderhoff all that tract," &c., containing twenty-eight acres and forty-nine hundredths of an acre, strict measure. That survey was filed on the 27th of June, 1883, and at *some* time the words "William S. Vanderhoff" were erased, and "George H. Cook" written in their place, not in Mr. Roome's handwriting. The handwriting of Professor Cook does not appear upon it. Upon that "survey" Mr. Force, on the 15th of July, 1884, a little more than a year later, made a "return," reciting the survey by Roome for George H. Cook of the land as described, "containing twenty-eight forty-nine hundredths acres, to which said Cook hath rights by virtue of an assignment of rights of location from Matthew Perrine." These rights of location were derived from the twelfth dividend. The return is dated the 15th of July, 1884, signed by William M. Force, deputy surveyor-general, and it is endorsed in this wise in Mr. Force's handwriting: "Sussex County, Sparta Township, July 15th, 1884, Charles E. Noble, Trustee, and wife to George H. Cook, acres 29 49-100."

In order to understand the force of this language it is proper to observe that at the May meeting of 1884 the council had ordered a warrant of location for ten thousand acres to issue to Charles E. Noble, who was then president of the council, in trust for the proprietors. This was the same warrant which was under consideration in the case of *Jennings v. Burnham*, 56 N. J. Law (27 Vr.) 289. That mode of making title to the lands, which the proprietors expected and hoped to sell, was adopted in accordance with the ancient precedents before referred to, instead of making an ordinary deed of conveyance under the hand of the president and seal of the council as had been the practice for

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about ten years previously. That endorsement on the return indicates that at that time, July, 1884, Mr. Force either expected, or was willing, that any person seeing that paper should believe that the transaction was in the interest of the proprietors. And this is further evidenced by an unexecuted deed in Mr. Force's handwriting, which was found among the papers, dated the 15th of July, 1884, purporting to be made between Charles E. Noble, trustee of the board of proprietors of East New Jersey, and his wife, of the first part, and George H. Cook, of the second part, whereby in consideration of one dollar Mr. Noble conveys the lands described in Roome's survey of Upper White pond to Professor Cook.

The correspondence indicates, as already observed, that Force's interest in Grinnell was concealed from Professor Cook, and also that this certificate of survey of Upper White was not at first disclosed to him, for we find Force writing to him on October 9th, 1883,

"I do not encourage the parties to locate White lake under rights [of location], but I have recommended that they purchase, as I want to see funds coming in to pay expenses."

Just when Professor Cook did become acquainted with these facts does not appear, but we find that on the 17th of May, 1887, he conveyed to Mr. Burt Upper White pond in consideration of \$900.

And it is proper just here to remark that the Matthew Perine rights upon which the Upper White pond was located are shown by a memorandum in Mr. Force's handwriting to have been purchased by Force in Cook's name, and paid for by Force.

Mr. Force received the cash from Mr. Burt for that conveyance, and August 2d, 1887, sent his check for one-half, \$450, to Professor Cook, who received it. This indicates that the transaction was the result of the suggestion in Professor Cook's letter of June 28th, 1883.

The next matter brought in question is Dunker's pond, which was surveyed in 1886. That lake lies in the upper part of Passaic county, near the Sussex line, and its outlet is one of the tributaries of the Pequannock river. At or before 1886 a large

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water company was engaged in buying up lands and water rights in that neighborhood, and their buying agent, Mr. Hoxie, applied to Mr. William Roome to purchase this Dunker's pond. Mr. Roome, from surveys and plottings to which he had access, was satisfied that it was mainly vacant land, and undertook to procure it for Mr. Hoxie. He was well aware of the instructions to deputy surveyors not to return ponds under general warrants, and swears that he supposed that the surveys he made at Upper White and Grinnell were made for the benefit of the council of proprietors. He had been employed by them for several years in field work in Ocean and Monmouth counties, was thoroughly familiar with their rules and regulations and with the ownership of the outstanding warrants of location. He and his father had sold some to Mr. Force at \$5 an acre. He swears that he understood that none of these lakes could be taken up on private rights, and therefore applied immediately to Mr. Force, as register and member of the executive committee who had in charge the selling of lands on behalf of the proprietors, to purchase this lake. His first letter to Mr. Force is lost; he states the contents of it. In his letter was enclosed an informal survey and map of the lake. In answer to that he received a letter from Force, dated February 4th, 1886, acknowledging receipt of his letter and asking him to

"make the usual return [by which he means "survey"] and have your father sign it, and let it state that it was done at the request of William M. Force."

A week later he received another letter from Force with some suggestions with regard to the description and map to be annexed to his survey. On February he wrote Force asking him to pass the Dunker pond survey as already prepared, and said if so, he thought he could sell it for him, as certain parties wanted to buy. On the 2d of March Force wrote to him that he would try and get the survey approved, and that he asked \$500 for it; there was a growing craze for the ponds, and he had just had a survey made of Little Swartswood, for which he was asking \$2,500, and that Decker's pond, previously sold to Mrs. Truesdell, was now priced at \$5,000. A day later, March 3d, he writes

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to Roome that Professor Cook had approved the survey with some corrections. Finally it was agreed that the price should be \$500. Then, on March 13th, Force writes to Roome a letter in which he uses this language: "If you will give me the name of the purchaser I will have the name put in the deed and *have the president sign it* and close the sale." That was, in effect, a statement to Roome that the sale was on behalf of the proprietors. The survey was approved by Professor Cook in his own handwriting, and filed February 12th, 1886, and was dated on that day. Under the same date Mr. Force, as deputy surveyor-general, made a return of it to Professor Cook under warrants of location, which Mr. Cook had derived from the heirs of Thomas B. Stout, and which, by the memorandum before referred to, were paid for by Mr. Force. Professor Cook then conveyed Dunker's pond to Senator Hobart, for which Mr. Force received \$500; paid \$10 to Mr. Roome for his services, and sent his check to Professor Cook for \$245, on the 1st of April, 1886. The Stout warrants of location were derived from the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth dividends, all merged.

The correspondence between Professor Cook and Mr. Force of this date, and the acceptance by Professor Cook of the one-half of the proceeds of Dunker's pond, shows that the scruples he had professed to feel in June, 1883, as to locating his own warrants while surveyor-general, had been removed.

It is proper to remark that there are two formal returns of this survey wholly in Mr. Force's handwriting, one dated the 12th of February, 1886, purporting to be signed by George H. Cook, surveyor-general; the other dated the same day, signed William M. Force, deputy surveyor-general. In this last the date "12th of February" has been written over the words "March 25th;" both of these are endorsed by Force as deputy surveyor-general, and one was originally recorded in Book S 21 of Surveys, page 198, as certified on the back, and that certificate altered to S 23, page 295; and the other is certified on the back to be recorded in S 23, page 295. They are actually recorded in two places; one in S 23, page 198, which record is not signed by

the surveyor-general; the other is in S 21, page 295, and is signed by Mr. Force as deputy surveyor-general.

Two other lakes were located by Mr. Force and Professor Cook, namely, Struble lake, which is also situate adjoining the Lehigh and Hudson Railway Company, the title to which was taken by Mr. Force, not parted with, and Little Swartswood lake, the title to which apparently rested in Professor Cook at the time of his death, and one undivided half of it was conveyed after his death by his widow and devisee to Mr. Force. The prayer of the bill is that these titles may be declared to be held for the benefit of the proprietors.

With regard to Struble lake: A large amount of evidence was introduced showing that it was taken up by Mr. Force under the same circumstances as that of the other lakes just dealt with, and, on the part of the defence, that, in point of fact, Mr. Force got no title from the proprietors, but that the whole lake was covered by previous surveys—mainly Brinley's, above referred to—which he was obliged to buy in; and the counsel for defendants offered to reconvey to the proprietors whatever rights Mr. Force actually got from the proprietors in that lake.

I have fully examined and considered the evidence with regard to this lake, but the fact that there is little in it to dispute about leads me to omit to state it, or give my conclusions thereon.

With regard to Little Swartswood: That is a small lake lying just to the east of the Lawrence line, and nearly adjoining the Great Swartswood, which lies to the west of that line. About 1882 or 1883 the proprietors, as we have seen, at the instance and upon the advice of Professor Cook, concurred in by Mr. Force, undertook the enterprise of ascertaining and locating all the lands in Morris and Sussex counties held under West Jersey patents east of the Lawrence line, and also hunting for lands that had never been located under either of the councils of proprietors, and a large expense was incurred in that line of examination. A young lad who was about to graduate from Rutgers Scientific School, named Blakeley, was employed by Professor Cook to do this work, the principal part of which was done in the office at Perth Amboy, by way of mapping surveys there

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recorded, or at Burlington, and piecing them together, but some of the work was done on the ground. In February, 1886, he was at work in Hardyston township, Sussex county, and went to Swartswood lake to locate there with accuracy the Lawrence line, which he had discovered, by inspection of the old map of it previously referred to, had a jog in it at that point. He did survey in the neighborhood, and also at the same time surveyed Little Swartswood by running the lines of the lake on the ice, including no land whatever. That this occurred in the month of February is made certain by Force's letter to Roome, dated March 2d of that year. Blakeley swears that he made the formal certificate of survey, or, as it is called, the "survey," about the 8th of April. Be that as it may, that formal certificate is dated Perth Amboy, May 5th, 1886, and is endorsed in Professor Cook's handwriting, "Received May 18th, 1886, and approved." It contains eighty-six acres and sixty-nine hundredths of an acre. When produced a computation was annexed to it, but no map as the rules require. A map was, however, found at the hearing and annexed to it. (There was also found and produced by the defendants a map of Great Swartswood lake, including Little Swartswood lake and the surroundings, with the location of the Lawrence line.) The return on that survey was made to Professor Cook, signed "George H. Cook, surveyor-general," but the whole, including the signatures, is in the handwriting of Mr. Force, and declares that it is made to Professor Cook by virtue of several warrants to him by the executors of John Stout, who were the executors of Thomas Stout, deceased, and those, as we have already seen, were purchased from the Stouts and taken in the name of Professor Cook with Mr. Force's money, and originated in the ninth, tenth, eleventh, twelfth, thirteenth and fourteenth dividends. The rule of the office requires that when a return is made of a survey on the strength of any warrant, the number of acres shall be charged against the holder of that warrant in the book of warrants. That is to say, a credit and debit account is kept of the warrants issued, to whom issued, and if assigned and conveyed, to whom assigned and conveyed, and the holder of the warrant is charged with all the surveys that are returned against it. The "return" in this case, except its

date, does not show when it was filed. It is recorded in the Book of Surveys, S 21, page 309, without any date of its record, but is subsequent to a return which is dated the 11th of March, 1889; another the 7th of December, 1888; another the 14th of December, 1887, &c., and is the very last return recorded by Mr. Force before he was superseded in office in May, 1890. The number of acres is charged in Warrant Book 11, page 99, against Charles E. Noble, trustee of the council of proprietors of East Jersey, for the ten thousand acres issued to him on the 20th of May, 1884. The words of the charge are these: "May 18th, 1886, S 21, 309; 86 69-100 rights of location." This is the last charge made against the Noble ten-thousand-acre warrant. There are twenty-four previous charges, and in each case the date of the return, the book and page where recorded, the number of acres and the person to whom sold, are given. In the charge of May 18th, 1886, the name of the person to whom the land was sold is not given, but in the place where that name should be is found the words, "rights of location." While the entry is dated May 18th, 1886, it follows ten entries of a later date. Besides this charge of the acres in this survey against Mr. Noble, there is a like charge against Professor Cook on page 96 of the warrant book. The entry there is: "86 63, George H. Cook," and before it, in pencil, "Little Swartswood," all in Mr. Force's handwriting, but without date, and no reference to the place of record in the book of surveys.

The significance of these dates is that while the "survey" of the lake was undoubtedly made before the time it bears date, and was filed and examined by Professor Cook at that date (May, 1886), the "return" was held back for some reason until some time, not earlier than the summer of 1889, as Professor Cook died in September of that year. The fact that the entire document, including the signature, is in the handwriting of Mr. Force, indicates that it was never seen by Professor Cook. His widow treated the title as having vested in Professor Cook in his lifetime, and on November 20th, 1889, shortly after his death, she conveyed an equal undivided one-half part of it to Force.

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It is alleged by the complainants that this survey on the ground, and all the work in connection with this lake, was done by Mr. Blakeley, while in the employ of the complainants, and at their expense. Some ten or fifteen different bills for services were rendered by Mr. Blakeley, extending over the time from 1884 to 1888, and some of them are duplicated. The latter part of the time of his employment, at the request of Mr. Force, he attempted to segregate these charges, and to distribute them over different points of work and different subjects. and the result of that effort is found in the book called "Book of Surveys and Expenses," all in Mr. Blakeley's handwriting, and a copy of which is also found in the manuscript in Mr. Force's handwriting. On that book, under the head of "Miscellaneous Accounts," are these entries: "1886, February 10th-12th, one day at tracing Lawrence line at Swartswood, expenses and board, \$4.50;" then "April 13th, 1887, one day making map of Swartswood lake, \$3.00;" then "April 14th-15th, making copies of certificate, \$6.00." Mr. Blakeley on the stand, in the first place, swore very clearly and distinctly that all the work he did was included in his bills and charged to the proprietors. The bills are all made out in that way. But when his attention was called particularly to this item of Little Swartswood, he swore that the charges just recited referred to his work in locating the Lawrence line at that point, and the map he made to illustrate it, and that by an arrangement between him and Professor Cook he was to charge the professor with the work of surveying Little Swartswood, and that he did so, and that Professor Cook paid him for it.

In that connection it is proper to remark that the defendants had free access to all of Professor Cook's papers, and spent some time in going through them, and that they have spared no pains or labor in preparing their defence, and that no bill from Blakeley to Professor Cook for this work was produced. The inference that I draw from the evidence on the subject is this: That Mr. Blakeley obtained this long job from Professor Cook, and received many hundreds of dollars from the proprietors for his services, besides all his expenses, and that if Professor Cook asked him to do the simple work which he did, namely, run around the edge of Swartswood lake with chain and compass on

the ice and make a certificate of survey as deputy surveyor, he would probably do it without charge to the professor. But there is one item in the account which seems inconsistent with even that theory. I have remarked that the certificate of survey made by Mr. Blakeley had no map annexed to it when produced, but that a map was produced afterwards which was made on tracing cloth, colored and tinted, showing the outlines of the pond, with topographical marks upon it and the lines of the survey running around the edge of the water, evidently the result of considerable labor. Now, the charges of "April 13th, one day making map of Swartswood, and 14th and 15th, *two days making copy for certificate*," altogether \$9, would seem to apply to the map annexed to the survey, which is undoubtedly a copy on tracing cloth from another map made on ordinary drawing paper, and the language used, "copy for certificate," is significant. The fact is that the document made by the deputy surveyor, which we usually call a "survey," is, in point of fact, a certificate under his hand that he has surveyed so-and-so for so-and-so, and the proper name of it is "certificate," and the word "certificate" in the charge just referred to properly applies to such a document. This entry in the Book of Surveys and Expenses does not, however, correspond with the original in his bill, which is for "making copy of Coxe survey for U. S. Court."

But I think it was the intention of the parties originally, both Professor Cook and Mr. Force, that the expense of the survey of Little Swartswood should not be charged against the proprietors; and this is manifest from a clause in a letter written by Professor Cook to Mr. Force, dated May 8th, 1886, just about the time this transaction was *in fieri*—a letter of great importance in another part of the case not yet reached—as follows:

"Mr. Blakeley was here on Thursday. He brought his journal of daily work and his expenses by items. As a tentative effort we went over his account and marked it under three heads—*first*, work like that done at Swartswood to be put in a bill by itself, and I to see it settled."

However, if my inference be reliable that this work was done *gratis* for Professor Cook, the result is the same, as it was in effect paid for by the proprietors.

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So much for the question as to whether the proprietors paid for this work. In other respects the case stands precisely like that of Dunker's pond and Grinnell and Upper White lakes, and we now come to the question as to the true solution of the rights of the parties in regard thereto, and I think that must be determined by considerations somewhat above and outside of the technical legal questions which were so elaborately discussed by counsel, and which I have already briefly stated.

The situation of the parties was this: The proprietors were the legal owners of all the unappropriated lands in East New Jersey. Their outstanding warrants of location were so many equitable charges against those lands, which, for present purposes, I shall concede that it may be doubtful at least whether the proprietors had the right to abridge or disturb by restricting their location. But be that as it may, the proprietors claimed openly, and their claim was well understood by Force and Cook, that they had the exclusive right to all of these lakes, and that they were not subject to being appropriated by ordinary outstanding warrants. The power of so appropriating them rested in the surveyor-general and the register, but more particularly, perhaps, in the surveyor-general, who was the officer who, by the long-settled practice of the proprietors, had the power to make a "survey," either in person or by a deputy, at the request of a warrant-holder, and then to make a "return" to him, thereby appropriating a certain portion of land to him in satisfaction of so much of his warrant. Without the action of the surveyor-general the warrant-holder was powerless. Now, at the time covering the transactions in regard to these lakes Professor Cook was the surveyor-general and Mr. Force was register, and, as he alleged, he was also deputy surveyor-general. Assuming that to be so, then the power of making these appropriations in the nature of partitions rested in their hands. They were also members of an executive committee of the council of proprietors, raised at their own instance, and they were by their own consent entrusted by the proprietors with the duty of making sales of all these lakes for the benefit of the proprietors, and they were, in effect, forbidden to make any returns of them on private warrants. That position was assumed by them voluntarily, and as

a result they, as trustees, owed a duty to the proprietors to act in the interest of their employers, and in my opinion it follows that it was not competent for them, while occupying that position, to make a survey and return on any lakes for their own benefit. Such action was a clear breach of the trust imposed upon them, from which, it seems to me, they should not be permitted by a court of equity to take any benefit.

Further, I think the result is not changed, if we admit to its fullest extent the position taken by the counsel of the defendants in his very learned, able and ingenious argument, namely, that the holder of these warrants had an absolute right to have them located on these lands.

But the argument of defendants' counsel proceeds further, and asserts that Mr. Force, although he had notice that the proprietors disputed the right, still had the right to purchase these warrants and locate them, and to be subrogated to the rights of the original warrantees or grantees of the warrants, relying in support of that position upon the familiar doctrine that a person who has notice of an outstanding equity or defence may purchase from a person who has no notice and be subrogated to his rights.

But I think that doctrine does not apply here. The position of Messrs. Cook and Force in this case, if stated in the aspect most favorable for them, was that of agents and trustees employed by their own consent to sell lands for the benefit of their employers, and who, holding powers of attorney to convey, yielded to a demand of a party having an adverse claim, and used their powers of attorney to convey to him, against the will, instructions and interest of their employers, and then, having vested title in the adverse claimant, repurchased the property from him. Such a transaction, it seems to me, cannot be sustained upon any principle of equity.

If those gentlemen, or either of them, desired to recoupe the losses they had sustained in their unfortunate location of warrants on Sandy Hook by locating upon inland lakes of East New Jersey, they should have resigned their positions as members of the executive committee, and as surveyor-general and register, and should have declined to serve the proprietors in the way they did, and applied openly for the right to locate upon these lakes.

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I think their official positions were incompatible with their claiming the right to locate these lands under warrants of location.

I ought, perhaps, sooner to have dealt with an objection taken by counsel for the defendants to this proceeding on the ground that there is here a defect of parties; that admitting that the council of proprietors, or the proprietors themselves, are a corporation and competent to sue, yet that they are mere trustees for the legal holders of the title, and that in an action of this kind all the *cestui que trusts* should be made parties, or at least enough of them to represent them all.

The difficulty of that position is at once apparent, viz., that, as I understand the decision of the court of errors and appeals in this cause, the proprietors themselves do compose and form the corporation, each being a member of it, and that their corporate action is manifested by their meeting in council under the agreement of 1725, and that the individual holders of proprietary shares are no more proper or necessary parties to this suit than would be the individual stockholders in a corporation necessary parties to a suit brought by the corporation to vindicate their rights. The distinction, however, drawn by the learned counsel was that here, by the well-settled law of the land, the title is vested not in the corporation, but in the individual members as tenants in common. Granting that to be true, still the individual members do, in the aggregate, form a body corporate, and they are competent to sue in their corporate capacity and not as individuals, and the suit is brought not by one or two or three, but by all, in their collective capacity, and it is brought by all for the benefit of all.

The counsel did not press the point with much earnestness, so far as regards the recovery of moneys, because he admitted that money, if any is collected in this suit, must go directly to the proprietors and not to the individual members, but he urged that that consideration did not apply to the recovery of lands, because that belonged to the individual members. But the decree asked for is that Force may be decreed to hold these lands in trust for the proprietors, and such decree will revest the title, if any passed, at law, in the proprietors as it stood before in their indi-

vidual capacity, and I am unable to see any incongruity in the proprietors in their corporate capacity coming to this court and asking it to decree that this title shall be vested in them individually as it stands by the strict letter of the law.

The principal object, however, of counsel in taking this objection was to prevent the evidence of any of the proprietors being legitimate as to conversations and transactions had with the deceased. But the answer first made, to wit, that the corporation is composed of all the proprietors, seems to me to meet that position, and that the argument, carried to its logical conclusion, goes so far as to hold that no person holding stock in a corporation could be a witness in a suit brought by the corporation against the representatives of a deceased party to prove transactions or conversations with such deceased party. But be that as it may, if the point be determined in the defendants' favor, the only result would be that the complainants would be obliged to bring in the individual holders of the proprietary shares as parties. They would not be obliged to make them parties complainant, but could make them parties defendant, and in that case, as I understand the statute, they would not be debarred from being witnesses. Moreover, I think it of not much importance in this case, as far as the lakes are concerned, because the evidence as to them is almost complete, without regard to any conversations with Mr. Force proven by any parties holding proprietary shares.

I now come to the more serious and difficult questions in the cause. I have referred to the situation of affairs in the spring of 1883, and to the attention which had been given by the council to the lands which it claimed along the coast, and which were about this time becoming valuable. These lands consisted principally of an island beach or tongue of land separated from the mainland by the waters of Barnegat bay, commencing at Little Egg Harbor inlet, the extreme southerly point of the domain of the East Jersey proprietors, and running north till it merges in the mainland at or near the southerly line of Monmouth county. About nineteen miles north of Little Egg Harbor inlet it is intersected by Barnegat inlet, and the island so cut off is called Long Beach, and averages a little over half a mile in width.

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Not far from its southerly terminus the two lines of Keith and Lawrence cross each other and form a little gore south of the crossing, which we may call the third gore, covering a part of the extreme southerly point of Long Beach, which appears to be a recent formation. About one-half of the southerly end of Long Beach was covered by the famous Coxe patent, the northerly end of which reached, but did not include, what is now known as Long Beach City. This Coxe patent was partitioned in 1818 between the then owners under it into nineteen lots by lines running across the beach. North of the Coxe patent comes that of Peter Sonmans, dated May 24th, 1690, about a mile in length along the beach, including Long Beach City and the point of the crossing of the railway from the mainland. Next, north of the Sonmans' patent, comes a vacant space of about a mile and a quarter in length, which had never been located. Next, north of that, comes the patent of Gordon, son of Gordon of Cluny, dated May 24th, 1690, extending a distance of about three miles. Then came the patent of Thomas Hart, February 4th, 1692, which extended to Barnegat inlet. Outside of the lines of these patents were several pieces of land and islands, especially a group extending into Barnegat bay, south of Barnegat inlet, which do not appear to have been covered by any patent. North of Barnegat inlet is Island Beach, which was partly covered by a patent to James Alexander.

In 1882 Professor Cook, Mr. Force and Mr. Howell reported on these ancient patents or surveys, and condemned them as not valid, and Professor Cook and Mr. Force were appointed a committee with power to make settlement with any claimants or those in possession under these patents. In 1883 Professor Cook, as surveyor-general, made a report to the council as to the progress he had made in the review of the ancient grants, and illustrated it by maps and locations, and also referred to the encroachment made upon East Jersey lands by the West Jersey grants, which report was approved, and the surveyor-general authorized to continue his work. Generally, the surveyor-general was directed to proceed and have plottings, surveys and maps made of the whole of the domain of the East Jersey proprietors, with a view of ascertaining—*first*, lands that had never been

located; *second*, the encroachments on East Jersey under West Jersey patents, and *third*, the invalid locations along the beach. It is important to observe this classification, as it has a bearing on the questions to be considered.

Some time in the fall and winter of 1883 and 1884, Mr. A. P. Irons, a surveyor of Toms River, had negotiated between Messrs. Culver and Wright (who were the present owners of the land covered by the patent issued to Gordon, son of Dr. Gordon, of Cluny, on Long Beach) and the proprietors represented by Mr. Force as a member of the executive committee, for a confirmatory title from the proprietors, and had agreed upon the sum of \$2,500 to be paid by Culver and Wright, of which he was to receive \$500 for making negotiations and survey, and the proprietors were to receive \$2,000. When he thought he had the matter ready to close Mr. Force told him that that survey could not be passed by the surveyor-general (Professor Cook) unless he received some pay, and suggested a contribution from Mr. Irons for that purpose, which he declined to give. Mr. Force then procured an interview with Messrs. Culver and Wright, or one of them, and induced them to advance their price to \$2,600, and then, on the 8th of March, 1884, brought the matter before the executive committee, stating it as a sale to Culver and Wright for \$2,600, of which \$600 was to go to Mr. Irons for his services as surveyor, &c. The executive committee approved it, and their action was reported to the council of proprietors on the 20th of May, 1884, and was approved by the council, and a "survey" and "return" of the Gordon survey was made by Mr. Noble under his warrant of ten thousand acres, before mentioned, and a deed made by him to Culver and Wright, and they paid the whole sum of \$2,600 to Mr. Force not later than the 28th of May, 1884. Whereupon Mr. Force wrote to Mr. John Kean, Jr., the then treasurer, under date of May 29th, 1884, as follows:

"Yesterday I came in the receipt of \$2,600, check for lands sold by the proprietors on Long Beach. I have deposited the funds in the Second National Bank of Jersey City, as register. There is to be paid out of this to the deputy surveyor, for expenses of various kinds, as understood by the board, \$600, and as I have the balance uninvested, submit whether

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I might not better pay out of this fund the bills awaiting payment, instead of drawing upon your invested funds. Your reply will oblige, Yours," &c.

It does not appear what reply, if any, Mr. Kean made to this letter. At any rate, Mr. Force kept that money and all subsequent receipts, amounting in the aggregate to more than \$19,000, for sales made of lands on the beaches just referred to.

On the 4th of June, 1884, he paid to Mr. Irons \$500, and took from him a receipt for \$600 "in full for *services rendered as a deputy surveyor* in the matter of the so-called Gordon patent on Long Beach, N. J.," as appears by Mr. Irons' receipt.

There can be no doubt from this and the other records that at this time the council were fully aware of the situation at Island Beach and Long Beach. They knew what patents were laid upon them, that there were vacant lands there, and that there was good prospect for them to recover a large sum from it. In fact, this sale to Culver and Wright was the first gathering of the profitable crop from that neighborhood promised by the report of the executive committee in 1880, before referred to. At the same time Professor Cook was, at each meeting, showing them the great prospect there was of recovering unenclosed lands covered by West Jersey patents in Morris and Sussex counties, and also lands in those counties unlocated under either set of proprietors, and they were authorizing him to expend moneys in search of those lands and in testing the title thereto. And it is quite apparent that there was a great distinction in the minds of the proprietors, and, in fact, between the lands on the beach, or beach land, as it was called, and those in Morris and Sussex counties, in respect to the knowledge of the proprietors as to the location of the two classes of lands and the probability of their being able to realize from them; and, with regard to the beach land, they had before them an object lesson in the case of the Gordon patent just sold for a substantial sum.

Among the resolutions of the executive committee reported to the council of proprietors at the May meeting of 1884 was one expressing appreciation of the work done by the surveyor-general in tracing up and mapping ancient locations by the earlier proprietors, and recommending that he continue the same as now

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being done, and another appropriation of like amount as the previous one be made for that purpose, *and that the surveyor-general and register proceed to investigate locations made upon lands of the East Jersey proprietors by West Jersey grants with a view of maintaining the rights of the council.* This was approved by the council. .

In the October meeting of 1884 of the council the surveyor-general made a verbal statement as to lands held under West Jersey titles, and explained the surveys he had ordered made and the maps and mode of identifying each item, and the contents of the same, without further cost of survey.

In the minutes of the same meeting, October, 1884, is this entry in Mr. Force's handwriting:

"The register called the attention of the board [council] to the lands held under the pretended patent to Daniel Coxe, and of the unlocated lands along the beach and elsewhere, and also those held under West Jersey surveys east of the Lawrence line; that the settlement of these matters after so long a delay would involve large expense, and suggested that not less than sixty per cent. would compensate for *the amount of clerical labor in searches and in recovering the rights of the East Jersey proprietors therein.*"

And then, on motion of Mr. Russell, that suggestion of the register was referred to the executive committee, giving full power to them to take action in the premises.

In this statement of Mr. Force it will be observed that he divides the landed property from which an income to the proprietors is expected into three distinct classes—*first*, the lands held under the Coxe patent; *second*, unlocated lands along the beach and otherwise, and *third*, those held under West Jersey surveys east of the Lawrence line. Then the matters to be compensated for by the sixty per cent. are—*first*, *clerical labor in searches*, and *second*, *in recovering the rights of the East Jersey proprietors therein.*

At the next meeting of the council, held May 19th, 1885, Mr. Howard Little, previously mentioned in connection with Lake Grinnell, took a seat in the council by virtue of a quarter share of "propriety" that, as appeared in the evidence, he held as trustee for Mr. Force. And at that meeting what purported to be the

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minutes of the proceedings of the executive committee of October 31st, November 10th, November 20th and December 4th, 1884, and May 13th, 1885, were read and approved by vote, except the minutes of December 4th, whose acceptance was objected to by Mr. Kean, and, on motion of Mr. Clark, the same were laid on the table; and at the same meeting Professor Cook, as surveyor-general, made a report relating to the progress that the board was making toward the recovery of lands previously appropriated by the West Jersey proprietors, and surveys that had been made and returned upon the beach at Little Egg Harbor, Shrewsbury river, &c., as directed by the executive committee, and the further work and progress toward completing the recovery of the lands to which the proprietors are entitled.

The minute of the executive committee, which was objected to and laid over, was in these words, as recorded by Mr. Force:

"WHEREAS, At the last meeting of the board [council] this committee were empowered by resolution to arrange for the early survey and location of unlocated lands east of the line of partition under a proposition or suggestion made by the register, and the same having been fully considered since the meeting of the board,

"*Resolved*, Upon motion of Mr. Watson, that the register proceed to have the records examined with a view to the locating and making sale of all unlocated lands, under the authority and return of the surveyor-general, beginning at Little Egg Harbor and running northerly, and that the register shall be entitled to compensation for such service to sixty per cent. of the lands so located, or sixty per cent. of the proceeds of sales thereof, with an allowance for surveyor's fees that shall not exceed twenty per cent. of the sum he may expend therefor on all sales made."

The action of the council thereon was as follows:

"Mr. Rutherford moved the acceptance of the minutes as just read. Mr. Clark called the yeas and nays. Upon call the yeas were Messrs. Lord, Cook, Rutherford, Little, Watson, Force—6. The nays were Messrs. Kinney, Kean, Clark, DeBow, B. F. Howell, B. F. Howell, Jr., Willis K. Howell—7.

"The acceptance of the report of the executive committee was not agreed to."

Now, it will be observed that of the six voting in the affirmative, Professor Cook, Mr. Force and his figurehead, Mr. Little, were three. It appears from the minutes that the discussion

upon this resolution of December 4th was continued in the afternoon, when the council adjourned until the 3d of June, 1885.

After the adjournment, and before the minutes of the meeting of June 3d, is entered this minute of a meeting of the executive committee, held six days previously, May 13th, 1885, follows:

"The surveyor-general submitted for examination the maps he had had prepared showing the encroachment of West Jersey and the lands held under titles of the West Jersey proprietors in the county of Morris only, amounting to about 130,000 acres, for which the East Jersey proprietors have had no compensation. Most of this has been lost by the effect of the statute of limitations, but vigilance may restore portions of it. The executive committee would therefore recommend that all such encroachments as made in Morris county [*sic*] that maps be also made for Sussex county and Passaic, upon lands lying there."

The language of this minute, which presumably was read to the council, is significant in its indication that their attention was particularly drawn toward the immense amount of land held in Morris county east of the Lawrence line that had never been located under the East Jersey proprietors.

The minutes of the meeting of June 3d, in Mr. Force's handwriting, are as follows:

"The minutes of the last meeting were read, and on motion of Mr. Condit were accepted and approved.

"The minutes of the executive committee of May 29th were read, and on motion of Mr. Pierepont were accepted.

"An adjournment of one and a half hours being made, this was agreed to.

"At 2½ o'clock P. M. the board reassembled. Mr. Peck advised a reconsideration of the vote by which the acceptance and approval of the minutes of December 4th, 1884, was lost.

"Mr. B. F. Howell claimed a right to make such motion, and moved a reconsideration of the vote upon the acceptance and approval of the minutes of December 4th last past. This was agreed to.

"On motion of Mr. Pierepont, *Resolved*, That the acts and proceedings of the executive committee, together with the minutes of their proceedings, be fully approved. This was also agreed to.

"On motion of Mr. Condit, *Resolved*, That the acts of the register in the surveys made under the authority of the executive committee be approved. This was also agreed to.

"Mr. Force asked that his resignation as register and member of the executive committee be accepted.

"The board then adjourned."

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Mr. Force, claiming to act under the resolution above recited, proceeded, and in the course of two years made sales of lands on the beach amounting, including the previous one to Culver & Wright of the Gordon patent, to upwards of \$19,000, out of which he claims allowances for expenses and commissions at sixty per cent., which exhaust nearly the whole amount, and upon that claim and account the principal dispute in the cause arises.

I have given the verbiage of the minutes as they appear upon the records. No other contract was ever made between the parties, and they are at variance as to the proper effect of that resolution. The complainants contend—*first*, that it does not by its terms include the beach lands at all, and *second*, that Force should be charged with all the expenses of searching, mapping, &c., incurred by the board under the supervision of himself and Professor Cook, and should be allowed for twenty per cent. of such only as bore fruit. On the other hand, the defendants claim precisely the contrary, viz., that the resolution included all lands in all parts of the complainants' domain, and that Mr. Force had the exclusive right of sale and disposition of all of them, and that all the expenses of searching, mapping and field work should be borne by the complainants, and that he, Force, should be charged with eighty per cent. only of such as bore fruit.

When the complainants filed their bill and procured their evidence they were unaware, apparently, that there was any other record of the resolution in question than that which appears on the minutes of the meetings of the council.

I have already alluded to the fact that there was no book of minutes of the meetings of the executive committee, and that all the record we have of those is found in the loose sheets of paper in Mr. Force's handwriting which were found during the progress of the trial among the papers of the proprietors at their office in Perth Amboy.

The complainants claimed at the outset—*first*, that the resolution was not entered in the minutes as it was actually read to the meeting, and *second*, if it was correctly entered, that its meaning on its face was so explained to the meeting by Mr.

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Force and his friends as to exclude the construction afterward put upon it by Mr. Force, and *third*, that even if construed without regard to the verbal explanation, but in connection with the collateral entries in Mr. Force's handwriting, it does not support Mr. Force's claim in this case, which is, as we have seen, to have sixty per cent. outright on all the sales made above mentioned, and to be charged as against that with only twenty per cent. of the actual expenses of the particular cases in which the sales were made, leaving to be borne by the proprietors several thousand dollars of expenses which were incurred in fruitless searches for lands. In fact, in his account, while claiming credit for some \$7,000 paid out for expenses, Mr. Force has charged himself with eighty per cent. of only about \$600 of expenses.

In the production of their case complainants called and swore as witnesses five proprietors who were present at one or both of the meetings of May 19th and June 3d, respectively, namely, Messrs. John Kean, Jr., Charles E. Noble, John Rutherford, Aaron Peck and Thomas T. Kinney. After those witnesses had been sworn, the defendants, who by their counsel had had free access to the books and papers of the complainants, produced some loose slips of paper in the handwriting of Mr. Force, which their counsel had found among the complainants' papers, purporting to be the original rough draft of minutes of the proceedings of the executive committee of December 4th, 1884, and of the council meetings of May 19th and June 3d, 1885. They also produced one other paper, in Mr. Force's handwriting, purporting to be a minute of the meeting of the executive committee of May 29th, mentioned in the minutes of the meeting of the council of June 3d, but which was not written out upon those minutes. This last paper was found among Mr. Force's private papers at his house after his death. The paper, purporting to be a minute of the proceedings of the executive committee of December 4th, 1884, is substantially the same as that entered in the book of minutes of the council. The precise difference is that the words "60 per cent. of the lands so located or," found in the minutes of the council of May 19th, 1885, have been erased from the original minute produced, and the words "on all sales made," found in the minutes of the council of May

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19th, 1885, are not found in the original minute, and upon a careful inspection of the minute of the council these words, "on all sales made," appear to have been written at a different time from that which immediately precedes them.

Another paper found and produced is the original letter of resignation of Mr. Force, dated December 4th, 1884, and addressed to the president of the executive committee.

Two papers in the handwriting of Mr. Force were also produced from the same source and found together, each purporting to be a minute of the meeting of the council of June 3d, when the action of May 19th was reversed. The two are not precisely alike, and they are neither of them precisely like the actual entry in the minute book, and I think it worth while to point out the difference. One of the papers overlooked an adjournment for luncheon, and proceeds to record so much of the proceedings as refer to the matter now in hand, as follows:

"The register submitted his resignation as register and member of the executive committee. Mr. Howell moved that the resolution of non-acceptance of the minutes of December 4th, 1884, be reconsidered. This was agreed to. Mr. Howell moved that the acts of the register thus far gone in his surveys be approved. Mr. Pierpont moved that so far as the action of the executive committee and the register had acted under the resolution of the executive committee of December 4th be fully approved."

It will be observed that this paper makes no mention of any adjournment or any report of the executive committee of a meeting held by them on the 29th of May, or that Mr. Peck advised a reconsideration.

The other paper is a fragment, and reads in this wise:

"At 2½ P. M. the board met, and the opinion that the minutes of the executive committee in their action of the 29th inst. was but a repetition in effect of the resolution of December 4th, slightly changed, and not strictly parliamentary, while the record of proceedings showed a refusal to accept the minutes of December 4th minutes; on motion of B. F. Howell, *Resolved*, That the vote as recorded of a refusal to accept the minutes of December 4th be reconsidered; this was by vote unanimously agreed to, and *Resolved* (on motion of Mr. Pierpont), That so far as the action of the executive committee and the register, as shown by the minutes of December 4th, be fully adopted and approved."

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Then follows: "The register tendered for acceptance of the board his resignation as register and as member of the executive committee." Here, again, the action on the part of Mr. Peck is omitted.

The paper found among Force's private papers, and purporting to be a minute of the proceedings of the executive committee of May 29th, was as follows:

"Board trade rooms, Newark, May 29th, 1885. The executive committee of the board of East Jersey proprietors met upon notice at 2 o'clock P. M. Members present, Messrs. Noble, Cook, Watson, Lord, Force.

"WHEREAS, At the last meeting of the board objections were made to accepting the minutes of this committee of December 4th last past, on motion of Mr. Lord, seconded by Mr. Watson,

"Resolved, That the true intent and meaning of said resolution was, at the time of its passage and adoption by this committee, and still is, that the register be entitled to 60 per cent. out of the sales of the lands located under the return of the surveyor-general, with an allowance of 20 per cent. of cost of surveys."

The admission of this paper in evidence was strenuously objected to by counsel for complainants as not competent, for the reason that it did not come from the possession of the complainants, and there was no proof that it was ever adopted by the executive committee or was the same which was read, if any was read, before the council of June 3d.

I think this objection is well taken, but as each party referred to it on the argument, I will hereafter give it such consideration as I think is due to it.

A fourth paper was produced in the same connection, also in Mr. Force's handwriting, which appears to be *verbatim et literatim*, the original of the actual entry in the minutes, and was undoubtedly prepared as a minute to be submitted to the next council meeting for their approval.

It is here worthy of remark with regard to all the minutes, as well those of the executive committee as those of the council, that though they show resolutions offered by different members of the committee and of the council, yet there is no paper produced showing what those resolutions really were in any other handwriting than that of Mr. Force. That they are not always

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to be relied upon as a correct history, appears clear enough from the instance of the minutes of the meeting of May 8th, 1883, with regard to the sale of Lake Grinnell, and also by the rough minutes produced by the defendants with regard to the minutes here in question. Moreover, the correspondence between Mr. Force and Professor Cook, leads one to doubt whether the minute of the resolution of December 4th, as recorded, reads as it was actually passed by the committee, for we find Mr. Force writing to Professor Cook as late as the 27th of April, 1885, shortly prior to the May meeting, stating that he had drawn the resolution of the executive committee "as to the matter of register urging forward the locating of unlocated lands by the East Jersey proprietors," and asking the professor to suggest any modifications or changes, and further saying that—"You will notice that I avoid mentioning any *reconsideration*, and, if necessary, I will say that I refused to act under Mr. Clark's pretended objections." Then follows a transcript of the resolution substantially, but not literally, a copy of that found in the minutes of the council. To that Professor Cook replied on the 1st of May thus:

"The resolution you sent I have read over several times, and think it correct, except that I understood that the proprietors were to pay not exceeding one-half the expenses of surveying (you have it one-fifth). I think this, however, may be judicious, as you have written it. As the time for the annual meeting is close at hand, and we are to have a meeting of the executive committee, I do not see that it can affect anything to say much about Mr. Clark's objections."

It will be seen at once, by a careful reading of the resolution forming the contract between the parties, that it is not easy of construction. Did it apply only to "unlocated lands" as a strict reading of it indicates? If so, then Mr. Force's claim cannot be sustained, for the greater part of the sales producing the \$19,000 was not of "unlocated" lands, but of proprietary rights in lands which had previously been surveyed and located under East Jersey rights, disputed indeed, but, nevertheless, actually surveyed and located.

The original suggestion made by Mr. Force to the council at the October, 1884, meeting, as recorded by him, mentions, as we have seen, three classes of lands—*first*, lands held under the pre-

tended patent to Daniel Coxe; *second*, unlocated lands along the beach and elsewhere, and *third*, those held under West Jersey surveys east of the Lawrence line. These, he said, he was willing to undertake to search for, recover and sell at sixty per cent. The correspondence between him and Professor Cook, which preceded the action thereon by the executive committee, showed that he intended to undertake only the lands included within Ocean and Monmouth counties, and to subject the council to the payment of one-half the expenses, but this seems to have met with opposition in the committee, and he contented himself with the resolution as reported.

Counsel for complainants made a very forcible argument that, taking all these collateral writings and the peculiar language of the resolution itself, it should, by proper construction, be confined to unlocated lands lying along or near to the partition line, and he relies particularly upon the preamble or recital which deals only with the "*unlocated lands east of the line of partition*," and he argued, why use the language "*east of the line of partition*," since all the lands necessarily were located east of that line, unless the draftsman intended to call particular attention to the great tracts of land located under West Jersey patents; and why speak of "*unlocated lands*" only when the original suggestion of Mr. Force, before recited, referred to three distinct classes?

That both Professor Cook and Mr. Force had doubts whether the resolution included all lands to be sold is manifest by a letter written by Mr. Force to the professor on October 3d, 1885, several months after the resolution had been adopted. In it he says:

"Shortly a meeting of the executive committee of the board will be called to meet at Newark. I will either use your name to the call or my own as secretary of executive committee. *I enclose a suggestion for your judgment etc I submit it to others* [these words of the last sentence are underscored], to wit,

"*Resolved*, That William M. Force be and that he act as the land agent of the board of proprietors of East Jersey, with authority to locate, under the approval of the surveyor-general, any unlocated lands of the East Jersey proprietors, and that he be entitled to 60 per cent. of such lands, or 60 per cent. of the proceeds thereof when sold, and that this resolution shall also have effect during the time he has served as register of the board."

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The object was not only to clear up all doubts as to the scope of the resolution of the previous May, but also to make it retro-active and to relieve him of any expense.

Then another question arises as to what was meant by "surveyor's fees," out of which he was to be allowed twenty per cent. The proof is very clear that the principal work of the surveyor in finding and locating vacant lands did not consist in going on the ground and measuring with chain and transit, but in the plotting and mapping of various surveys on paper in such a way as to show vacancies. And this is properly surveyors' work. In point of fact, as we have seen, a great many certificates of surveys are made by deputy surveyors where they do not go upon the ground at all, but rely upon the descriptions contained in former surveys on record in the office of the register at Perth Amboy. Roome's Dunker pond survey is an instance. The proofs show that much the greater part of the expenses incurred by the proprietors in the matter in hand was in paying surveyors for mapping and plotting in the office at Perth Amboy, and this was, confessedly, the only mode in which the actual vacancies could be ascertained.

Then, again, by the terms of this contract the question arises, Upon whom was cast the burden of the immense expenses to which the proprietors were subjected, upon the recommendation of Professor Cook and Mr. Force, in hunting for lands all over the eastern division of New Jersey? For it is proper to remark here that that work went on from 1884 and 1885 forward, and included not only extensive and expensive investigations in Sussex and Morris counties, but hundreds of dollars spent in plotting the surveys upon the Newark meadows between Elizabeth and Newark, looking for vacant land there. And this is the very kind of work which Mr. Force, in his suggestion to the proprietors in October, 1884, stated to be a part of that for which the sixty per cent. was to be allowed, and in the contractual resolution itself the register is directed "to proceed to have the records examined with the view to locating and making sale of all unlocated lands," and for this service he was to receive sixty per cent. of sales. And for all this work bills were made out to the proprietors, and part of them paid for by the treasurer of

the proprietors, and the balance by Mr. Force, and brought in against them as an offset to their claim against him for moneys received on the sale of lands.

The work of looking for lands to sell and making sales went on *pari passu* under the contractual resolution which requires the

"register to proceed to have the records examined with a view to locating and making sales of all unlocated land, and that he have compensation for such services to sixty per cent.," &c.

Now, was he by this resolution to do that work at his expense, and get back from the proprietors twenty per cent. on the sum he might expend, or were the proprietors to bear the expense, and he to be charged with eighty per cent. of the expense of those searches only which resulted in finding lands which could be sold and a return made therefor? Mr. Force claims, notwithstanding the language of the resolution just quoted, that the council was to bear all the expenses, which, as before observed, amounted to about \$7,000, for these investigations, while he was only to pay eighty per cent. of that part of it which produced results.

Without at present answering these questions, I will proceed to refer to the evidence of the witnesses on both sides as to what occurred at the meeting of June 3d.

Mr. Aaron Peck, a highly respectable gentleman, and one of the proprietors, swears that he was not present at the meeting of May 19th, 1885, when the council refused, by a decided vote, to approve the resolution in question, but he heard from Mr. Amos Clark, Jr., what was done, and attended the meeting on June 3d. At first he was decidedly opposed to the resolution, but changed his mind as the result of an interview with Mr. Force. Whether that interview occurred before the meeting of June 3d, or on that day, between the morning and afternoon session, is not quite clear. I am inclined to the opinion that the interview occurred on June 3d. after the morning meeting. Be that as it may, I am entirely satisfied that Mr. Peck's recollection that the interview did occur is reliable and accurate, and he says that Mr. Force sought the interview and explained to him that the resolution referred to the lands lying east of the Lawrence line and

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on the disputed boundary strip or gore between East and West Jersey, which lands were held under West Jersey warrants, and had never been located under East Jersey warrants, and that he (Force) was willing to undertake the risk and expense of recovering them at sixty per cent., and that the resolution was not intended to apply to the beach lands. On the strength of that statement by Mr. Force, he (Peck) went into the meeting and advocated the approval of the resolution, and, for the purpose of producing that result, stated to different members of the council, across the table in a conversational way, the explanation which Mr. Force had made to him, and after such explanation was made the resolution passed.

Mr. Kean swears that there was considerable discussion as to the scope of the resolution, and, as he understood it, and as it was explained to him, it did not include the beach lands, but applied only to the lands to be discovered and located east of the Lawrence line in Morris and Sussex counties, being the lands which had been talked about from time to time by Professor Cook and Mr. Force in the council as promising profitable results to the proprietors.

To the same effect is the evidence of Mr. Noble. He did say that he understood the resolution applied not only to the lands which were held east of the Lawrence line under West Jersey patents, but also to other lands, but that it did not include beach land. Counsel for defendants relied strongly in his argument upon the fact that Mr. Noble did mention other lands, but I construe his answer to apply to those other pieces of land scattered through Morris and Sussex counties which had never been located under West or East Jersey, and which, it will be remembered, constituted one of the classes of lands from which Messrs. Cook and Force were promising profit to the proprietors.

To the same effect is the evidence of Mr. Robert W. Rutherford. Mr. Rutherford emphasized his evidence by saying that the council of proprietors already knew all about the beach lands, and, as he expressed it, it had been decided that they owned those.

Messrs. Condit, Little and Watson were called for the defendants, and a careful examination of their evidence seems to me to

make in favor rather than against the complainants' contention that the resolution was explained, at least, at the meeting to apply only to the lands lying east of the Lawrence line which had been located under West Jersey patents.

The evidence of Mr. Little, who had attended several of the sessions of the court and heard much of the evidence, and who was the friend of Mr. Force, is particularly significant. Under the examination of counsel for the defendants he testified thus:

"Q. Have you this morning, in the courtroom, examined the resolution of the executive committee as recorded on page 158 of the minutes of the proprietors in Book of Minutes D?

"A. I have not.

"Q. Will you look at the resolution?

"A. There it is. [The witness, after reading the resolution, said:] I remember such a resolution: yes, sir.

"Q. And was that resolution also presented by the executive committee at the June meeting?

"A. Yes, sir; that is the same as I remember it.

"Q. Now, will you state what the resolution was, as nearly as you can remember it?

"A. Well, as I remember the resolution—I have heard bits of testimony here, but never had access to the book; I got the book this morning, but turned it over to Mr. Condit without looking at it—that the intention of the resolution was—you want me to speak of the May or June meeting now?

"Q. Well, I speak of the resolution as it was offered by the executive committee.

"A. Yes; well, that was in reference to the compensation to Mr. Force of sixty per cent. and an allowance, and so forth; and at the May meeting it met with some objections; and as I would remember, the prominent parties was John Kean and Amos Clark and Thomas T. Kinney; then at the June meeting this resolution came up, and *Mr. Peck talked upon the resolution of what this was to cover, and I never had any other idea in my head only to cover the West Jersey location in East Jersey, and the angle or gore lots.*

"Q. What do you mean by 'the angle or gore lots'?

"A. *I mean by the difference between the Lawrence line and the Keith line, and the quinti-partite line, and they were referred to as upon the maps upon the table.*

"Q. (By the court.) *I understand you to say, then—I want to repeat it now, for your voice is so low—that you had no other idea in your mind from what was said there except that the resolution referred to the West Jersey encroachment and what laid in what is called the disputed gore?*

"A. Yes, sir; that is all there was.

"Q. (By Judge Stevens.) Well, anything else?

"A. Not upon that point.

"Q. What?

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"A. Nothing more upon that point, only the resolution at the June meeting the executive committee was sustained.

"Q. Well, was anything said about the beach lands?

"A. That was in discussion; that was in discussion, but I, not being familiar with that—I remember a discussion in regard to it.

"Q. Well, what was the discussion?

"A. Well, something about beach lands being embraced into it, but just where they were—they were down in Jersey, and out of my latitude."

And further on, after being exhaustively examined and pressed by the defendants' counsel, this question was put by him:

"Q. Now, I ask you whether any statement was made as to what lands were intended to be embraced within the scope of the resolution as indicated by those maps?

"A. *It was all West Jersey surveys in East New Jersey, and all the land that was included in the angle or gore lots; and some had located on West Jersey rights in East Jersey, and vice versa, and they had had an opportunity to correct the title of East and West Jersey locations, and some had done it; and the discussion went along in that way.*

"Q. Was any reference made to the beach lands?

"A. I remember the Coxe—I remember the Daniel Coxe.

"Q. Patent?

"A. Yes, sir; I remember that.

"Q. Well, any other beach lands?

"A. Well, I could not tell now unless I heard the names, because I didn't take the interest in lower New Jersey that I did at home or in that vicinity."

This is the evidence of a friend of Mr. Force who is called by the defendants, and, as such, has much significance.

My conclusion is that I must consider the oral evidence just recited as showing that the scope of this rather vague and ambiguous resolution was inquired into and discussed by the council, and that at the request of Mr. Force and in his presence it was explained, as is shown by his own minute, by Mr. Peck, as applying only to lands in Morris and Sussex counties not appropriated or located under the East Jersey proprietors.

This view is, I think, supported by the resolution found in the paper before referred to, purporting to be a minute of the proceedings of the executive committee held May 29th, 1885, between the two meetings of the council on May 19th and June 3d. That resolution is sufficiently broad, sweeping and unequivocal in its terms to include all the lands here in question,

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since it was clearly not confined to "unlocated lands," but to all land thereafter to be located by the surveyor-general. Now, it either was or was not approved by a meeting of the executive committee on May 29th. It was certainly prepared by Mr. Force, either at or before that meeting, for the purpose of receiving the approval of the executive committee, or it was prepared afterwards. Now, if it did receive the approval of the executive committee, then I see no reason why it should not have been treated as other minutes of the executive committee were by being reported to the council, and, if approved, entered on the minutes of the council; and if it had been approved by the executive committee and reported to the council as the minutes of the council say it was reported, then it must, in the ordinary course of business, have either received the approval or disapproval of the council. Now, if it received the approval of the council, then I see no reason why it should not be entered on the minutes.

And just here comes the peculiarity of one of the papers purporting to be a rough, but fragmentary, minute of the meeting of June 3d, which is above recited. It commences at the top of the paper with these words:

"during which time a motion to adjourn for dinner prevailed. At 2:30 P. M. the board met, and the opinion [sic] of the minutes of the executive committee in their action of the 29th inst. was but a repetition in effect of the resolution of December 4th, slightly changed and not strictly parliamentary, while the record and proceedings showed a refusal to accept the minutes of the 4th," &c.

Now, I am unable to see anything unparliamentary in the committee declaring by resolution just what it did mean by a previous resolution reported to council, which evidently was capable of being misunderstood, and which had led to discussion as to its meaning; and if such explanatory resolution was reported to the council, I see no reason why that body should not adopt it if it approved it, and their action be entered on the minutes with the resolution at length. Such action of the council would have dispensed with the lengthy discussion which confessedly took place as to the meaning of the original resolution. Hence, as it seems to me, the statement just quoted, found in the fragment of a rough minute, taken in connection with the

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failure to record it or the resolution in question in the book of minutes of council, amounts, in effect, to a statement that it did not meet the approval of council. And then it follows that the fact that Mr. Force prepared the resolution of May 29th shows at once that he did appreciate the fact that the resolution of December 4th might be so construed that it would not include the beach lands. The result is, it seems to me, that the existence of that paper, under the circumstances, and in the light of the other collateral and cotemporaneous papers and entries, makes against, rather than in favor of, the defendants' contention.

It is objected by the defendants that the oral evidence above recited is not competent to explain the writing or to restrict its effect, and that Mr. Force is not estopped by what occurred in his presence from falling back upon the literal construction of the contract. It was argued with much earnestness that there was no proof that the council acted upon the statements made by Force to Mr. Peck. But in the face of Mr. Force's entry in the official minute that "Mr. Peck advised the reconsideration of the vote," and of the direct evidence of Mr. Peck and Mr. Little on that subject, and of the fact that Mr. Force was present when the explanations before mentioned were given, I am unable to perceive how he can now be permitted to claim, as against the proprietors, that the resolution has a different significance from that which he knew at the time the council attributed to it.

I think the moral rule of Mr. Paley has some application here, viz.:

"When the terms of the promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it." *Chit. Cont.* (11th ed.) 104.

Professor Parsons, in his treatise on contracts (2 *Pars. Cont.* part 2 ch. 1 § 3 (5th ed.) 499), says:

"So, too, the situation of the parties at the time, and of the property which is the subject-matter of the contract, and the intention and purpose of the parties in making the contract, will often be of great service in guiding the construction, because, as has been said, this intention will be carried into effect so far as the rules of language and the rules of law will permit. So the moral rule above referred to [Mr. Paley's] may be

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applicable, because a party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties."

It seems to me that it would be highly inequitable to permit Mr. Force, having admitted to have received about \$19,000, money belonging to complainants, to retain a large portion of it upon a construction of the contract different from that which the complainants were induced by his active efforts to put upon it, or, at any rate, which with his acquiescence they did, in fact, put upon it.

It is quite manifest that Mr. Force all the while intended to claim the whole sixty per cent., and also that he thought he might have difficulty in inducing the council to accede to his claim.

This is shown by the correspondence between himself and Professor Cook, which has been put in by the defence, subject to objection by the complainants. The ground on which it was offered was that Professor Cook was the official representative of the council, and his letters to Mr. Force ought to bind the council. I cannot take that view. Professor Cook was simply surveyor-general and one of the executive committee. His duties as surveyor-general did not authorize him to bind the proprietors, except in matters of the actual survey and allotment of lands, and the same may be said of his power as a member of the executive committee, and therefore I am of the opinion that the letters were not competent. However, they were commented upon by both parties in argument, and I will give the result of my examination of them. Indeed, I have already alluded to some of them.

After the meeting of the council of October, 1884, and previous to the meeting of the executive committee of December 4th, 1884, Mr. Force wrote to Professor Cook notifying him of a meeting of the executive committee, and uses these words, referring to the terms upon which he should undertake to make a sale of the lands under the suggestion above recited made by him to the council at the previous October meeting:

"Please outline what you think would be best for me to undertake on the terms for the board. I am willing to take Ocean and Monmouth

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counties, one reason of which is, one who can direct with confidence can effect much more than if delayed for the uncertainty of a board meeting, and more effort to secure results will be developed. I would like included half the expense for surveys. They are now willing to give 50 per cent. It is certainly worth something to organize and manage, but I will be content with your discretion."

In answer to that letter Professor Cook wrote that he thought that the terms of having one-half of the expense of surveys would be fair, and suggests that not himself, but some other member of the committee should make the motion.

It appears that there was a meeting of the executive committee between that date and the 1st of December, in which Mr. Force's plans met with opposition, for on that day Mr. Force writes Professor Cook that he is dissatisfied, and proposes to call a meeting of the council of proprietors and to tender his resignation. All this is before the meeting of December 4th.

On the 26th of May, 1885, after the meeting of May 19th, and before that of June 3d, Professor Cook writes to Mr. Force with regard to the refusal of council to approve the resolution of the executive committee, in which he speaks of the result of that action as being equivalent to a vote of a lack of confidence; discusses the amount of compensation Mr. Force was asking, and then hints at compensation for himself in these words:

"What has been paid to the surveyor-general in former times—perquisites, fees or lump payments? Or has he been left to make his pay by taking advantage of his position and knowledge of the proprietors' affairs? It may be well to have that subject brought up and defined."

Then adds this:

"If there should not be any satisfactory action or conclusive one, it may be well to let matters go for six months, and in that time to locate our rights and have that matter cleared off. The large amount of rights located on Sandy Hook [referring to the joint enterprise of himself, Russell and Force] is mostly (not all) a mislocation, and should be returned, retaining the part which is an accretion from Shrewsbury. This could be done under Mr. Browning's opinion. What upon the whole is best to do we must determine in part for ourselves and part in executive committee."

This letter shows clearly that Professor Cook was acting in concert with Mr. Force, and we shall see further on that such concert of action became closer and more thorough.

Next, we have one of October 6th, 1885, from Cook to Force, four months after the meeting of June 3d, in which he uses this language:

"To me there seems no objection to making it in the executive committee. [This evidently refers to something which had been discussed between them orally.] Mr. Clark probably will not come, and if he does, *we shall outvote him*, and our proceedings are then perfectly open. It would be well, however, to have the other gentlemen you mention also present."

Then comes this:

"The more I think of your plan for ascertaining and selling what property we have left the better I like it. The percentage is not too large. *In regard to the surveying, I think the plan will go most favorably with weak and unenterprising members if the cost of surveying is first paid from the sales and the balance divided, and the expenses already incurred and paid from the proprietors' funds may be reimbursed in the same proportion as the lands already surveyed are sold.* This, which is a minor matter, should be put so as not to arouse any questioning from those who want to hold back."

This shows that they were already discussing the question as to what should be done with the great expense the proprietors had incurred, and were still incurring, under the direction of the professor and Mr. Force in hunting for vacant land.

On November 17th, 1885, Professor Cook writes to Mr. Force, suggesting that they should have Mr. Kean, who was opposing their plans, removed from his office of treasurer. Then he encloses a bill for surveyor's services, which was audited and approved, and proposes to send all the bills of surveying to be filed at Perth Amboy, then adds this:

"The business of the board which you are doing is not appreciated fully from their not understanding it, and perhaps having no active belief that there is anything worth spending money for. *When anything further comes in you will not find the least hesitation about paying your proportion, and when the back survey bills are being settled there will be an opportunity to revise the pay of the Gordon sales.*"

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This relates to the sale made of the Gordon patent to Culver and Wright in May, 1884, a year before the adoption of the sixty per cent. resolution.

On the 23d of March, 1886, Mr. Force writes to Professor Cook, summing up all his sales to that time to \$10,000, and then says:

"I have paid very liberally for expert services, securing customers, and commissions on sales, which secured the service. * * * There is much more yet to be done. I think the way is opening for us to public confidence, and prejudice will subside under proper care. The undertaking has been quite a bold one, though we have done well, I think. I have not footed up the expenses yet, but have paid Thomas up all but say \$100, thus keeping him in my service. Without him I could have done but little. *When I see you I want to talk over expense matters, &c., AND GET AT A SUM TO PAY YOU. I am seeking for myself 30 per cent. net;* over and above this goes to Thomas [which was twenty per cent.], *the surveyor-general's account and expense account* (that is, legitimate expenses under the resolution of the board). I make this statement that it may be understood should anything happen to either of us unexpectedly."

This indicates a division of the sixty per cent. as follows: Twenty per cent. to Thomas, thirty per cent. to Force, and ten per cent., less expenses, to Professor Cook.

Among the papers in Mr. Force's handwriting, found in the office of the proprietors after he left, and produced by the complainants, is one containing a statement, all in his handwriting, of different rights (warrants) of location and proprietary rights (shares), called "proprieties," which he had purchased, some of which went to Professor Cook, with a memorandum that they were paid for by him, Force, and the whole is endorsed—"Statement of rights of Professor Cook, propriety, &c. Cook to pay one-third of the Sandy Hook; if so, he will owe me fifty acres." In that paper is a statement in Mr. Force's handwriting containing a footing of the whole sales which he had effected up to that time, amounting to \$19,179. Then is added:

"The above equal, at 10 per cent., \$1,917.

"Take from this, paid for rights, _____.

"Take from this, paid for propriety, _____."

without carrying out the amount.

I think this indicates pretty clearly that Mr. Force intended to allow Professor Cook ten per cent., less his, Force's, share of the expenses, upon all the sales that he made for the proprietors, and charge him, on the other hand, with the cost of the rights of location and propriety interests which he had bought for him and paid for. The effect of this arrangement was to make Professor Cook directly interested in reducing the part of the expenses to be charged to Mr. Force by saddling as much as possible thereof upon the proprietors. About this time, also, it is to be remarked, Mr. Force was dividing with Professor Cook the proceeds of the sale of the Upper White and Dunker's ponds.

On May 6th, 1886, which was just prior to the regular semi-annual meeting of the council in that month, and after Mr. Force had made considerable sales of the lands, he writes this letter to Professor Cook:

"I have been examining accounts with proprietors, and find I have paid out for their account say \$1,200 on bills ordered paid but not drawn from Mr. Kean. I think it may be well to change the treasurer. He pays no attention to the duties. By his report he shows \$1,500 lying in his bank unemployed. He performs no duties, gives no time or attention. I have on this sheet suggested making my sales account wholly distinct from current expense account in the form, you will notice. In this there can be no mystery to anyone. Should you see some other form, please suggest it, that I may have all in clear and satisfactory shape and form,"

and then adds form for statement of account.

In reply to that, Professor Cook writes on the 8th of May, 1886:

"Yours of the 6th is received. Mr. Blakeley [that is, the surveyor employed under the direction of Professor Cook and Mr. Force] was here on Thursday. He brought his journal of daily work and his expenses by items. As a tentative effort, we went over his account and marked it under three heads: 1. Work like that done at Swartswood to be put in a bill by itself, and I to see it settled. 2. *All work and expenses in searching and arranging records and materials for future sales in Sussex, Morris, Ocean, or any other part of East Jersey, to be called office expenses; this is to be paid entirely from the proprietors' funds.* 3. Such expenses as have been incurred in preparation for and in making sales to be charged to the account of contract expenses, and to be divided and paid, 80 per cent. from your share and 20 per cent. from the proprietors' share of the sales. *In what is now office expenses* it may be that after the next settlement after sales, if some of what has been paid as office

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expenses should be transferred to the contract expenses and divided between yourself and the proprietors. There will always be an account of expenses incurred by the office and myself, for which corresponding sales must necessarily come at a later date. Does this division accord with your plan, and is it equitable?"

Now, considering that Force's letter of the previous March shows a clear intention on his part to divide his profit with Professor Cook, this letter of May 8th is significant. It shows a plan of these two gentlemen to do what Mr. Force did in his final account, namely, charge against the proprietors all the expenses of making maps and surveys, and credit them back with only eighty per cent. of so much of them as should prove fruitful in producing results. And such a mode of adjusting the accounts was necessary in order to so reduce the expense account as to leave something out of the ten per cent. for Professor Cook. But it seems to me quite inconsistent with the letter and spirit of the contractual resolution, which was that Mr. Force should do the searching, primarily at his own expense, and then charge back to the proprietors twenty per cent. of so much of it as bore fruit. The logic of the language of the contract is that Mr. Force was to charge the proprietors twenty per cent. of moneys *he* had expended, and not that the proprietors were to charge Mr. Force with eighty per cent. of money *they* had expended.

The minutes of the regular semi-annual meeting of the council, held May 18th, 1886, show that Mr. Force had made a statement to the executive committee three days previously, showing in detail the sales up to that time, amounting to \$10,884, and also a statement of expenses incurred in surveying, &c., and other bills which are not footed up, but not giving any statement of the amount of his claim for commissions and surveys.

On the 26th of May, a week later, he writes a long letter to Professor Cook, in which he states that he is engaged in "making up statements for examination of yourself and executive committee." The letter is too long for quotation at length, but it shows that he was exercising some ingenuity in making up his statement of account in such a way that it would probably be satisfactory to the executive committee and council. A day later Mr. Force receives a reply from Professor Cook, in which is this significant language:

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*"I think it quite as well not to have made a full settlement at the annual meeting. The amount of expenses, compared with the receipts, will probably make a better showing next fall than they do now. * * **
 If you consider the Jennings bond a good one, and that your claim covers it, as I have no doubt it does, I see no reason why it should not be assigned to you."

The Jennings bond was part of the consideration received on sale of land.

Further sales, and, in fact, I think all, amounting to upwards of \$19,000, were made before May, 1887, and reported to the executive committee in detail, but without any statement of the account between Mr. Force and the proprietors. But that Mr. Force was preparing his account with care is manifest from a letter which he writes to Professor Cook on May 19th, 1887, two days after the semi-annual meeting of the council. In it he desires the professor and Mr. Blakeley, the surveyor, to go over the latter's account, and charge Mr. Force with what he should pay of the general bills, to avoid dispute with the board when his account is submitted; then he uses this significant language:

"I am now desirous to adjust with others the percentage, deducting the expenses. By thus being prepared I can meet boldly all questions and be sustained on the basis of the resolution. And should any change take place in the matter of sale, &c., I can claim my interest in the preliminary work I have been doing. I do not desire to be charged with ordinary office expense or materials for account of the general board, but such as are proper for me to pay under my contract. Through Mr. Blakeley and yourself I can feel safe and be protected in case of misunderstanding."

The letter, taken as a whole, is quite suggestive, but too long for further quotation.

At the October, 1887, meeting of the council Mr. Force, according to his minutes, submitted a detailed statement of his receipts and expenditures and disbursements, and it was resolved that he submit the same to the action of the board; and then, on motion, the statement of the register was referred to a committee to examine same and report. Messrs. Ward and Tichenor were appointed that committee.

At the May meeting of 1888 the committee made their report, dated May 15th, 1888, to the effect that they

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"had examined the books and vouchers presented to us, and find that from the book of minutes the register has been authorized by the board, from May 20th, 1884, to May 17th [*sic*], inclusive, to pay bills amounting to \$2,870.47, but many of the vouchers therefor have been mislaid. On account of mappings, surveyings, &c., the register had paid to G. H. Blakeley \$3,297.84, to J. H. Porter \$83.33, and to N. B. K. Huffman \$748.07, as per their receipts. The sales of the land reported by the register amount to \$19,054, showing a balance due the proprietors of \$12,054.29, less the commissions due to the register of the board."

Then follows a recommendation that the register should be relieved of the task of receiving and disbursing money which properly belongs to the treasurer.

It will be seen at once that this report amounts to no more than a mere verification of the footings of the account and shows no evidence of any careful investigation of it, and in point of fact the proof shows that none was made, and anything like a careful investigation would have discovered the palpable errors hereafter to be referred to.

The account thus dealt with is entered at length on the minute book at the end of the minutes of this meeting. It is composed of several separate sheets of bills and receipts, the charges containing four items of \$2,870.47, \$3,297.84, \$83.33, \$748.07, making a total of \$6,999.71. He charges himself with sales of land in detail amounting to \$19,054, leaving the balance found by the committee of \$12,054.29. Then is added: "The register is debtor to forty per cent. on sales of \$19,054, amounting to \$7,621.60, and to eighty per cent. of surveys on sales made \$437.85." The cash balance of \$12,054.29, mentioned in the committee's report, does not appear in the statement, nor is there any footing to show how the account actually stood, but I make his total debits against the proprietors \$18,432.11 and his credits \$19,491.85, leaving a balance due the proprietors of \$1,059.74. Whether this result was made known to the council and understood by them does not appear, nor does it appear when the account was entered at length on the minutes, for its appearance there is subsequent to the president's signature to the minutes, and that signature is usually appended after the minutes have been read and approved at the next meeting, which was October, 1888.

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I find no resolution was passed approving the account, nor does it appear that any discussion occurred.

The report of the auditing committee, above in part recited, is entered on the minutes *verbatim* with the signatures of the committee, precisely as in the original document. Between the body of the report and the signatures are squeezed in, evidently written afterwards, these words, thus (including the last line of the report) :

"belongs to the office of treasurer. *On motion the report was accepted and the committee discharged.*

"F. M. TICHENOR,
"MARCUS D. WARD,
"Committee."

and after the word "accepted" is an erasure of a word which, under the glass, seems to me to have been "approved."

The minutes of the next meeting of the council (October, 1888) state that it was moved and agreed that the executive committee should make settlement with the register for lands sold by him, and report to the next meeting.

The minutes of the meeting of council of May, 1889, record a meeting of the executive committee on April 18th, 1889, stating that Mr. Force submitted a supplemental account to the committee charging himself with \$1,059.74 as the balance due on his previous account, and charging the council with various items, including a payment of \$302.24 to the treasurer. The minute does not state who were present at this meeting, or that any discussion took place. This supplemental statement is incorrect on its face, as it mixes debits and credits, and the payment to the treasurer, for which credit is claimed, was not made until a month later.

It appears that at the May meeting of 1888, when Ward and Tichenor made their report, Mr. Kean was relieved of his office of treasurer, and Mr. Watson, who was friendly to Mr. Force, was appointed in his place, and on May 20th, 1889, Mr. Force paid him \$302.24. The receipt is in Mr. Force's handwriting, is somewhat peculiar, and reads thus:

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"Received of William M. Force, register, payment for sales of Logan tract, \$120, and William Thompson, \$50; also check for balance on account, per statement rendered, \$303.24."

Professor Cook died in September, 1889. On the 15th of October, 1889, Dr. Goodridge, a comparatively new proprietor, was elected surveyor-general in his place. Between that and the next meeting Dr. Goodridge, for the purpose of learning the duties of his position, made some examination of the records and affairs of the proprietors, and came to the conclusion that the accounts of Mr. Force and his conduct would not stand examination, and indicated his suspicions to several members of the board, with the result that at the May meeting, 1890, Mr. Force was not re-elected register. His account was submitted to an expert accountant, with such vouchers as were furnished, with the result that large and palpable errors were found in it. Upon the report of the accountant and the investigation of Dr. Goodridge this bill was filed.

The bill charges, among other items, that Force failed to charge himself with certain moneys received from sales of land, amounting to less than \$300. These are either admitted by the answer or proven.

The bill charges, further, that Mr. Force in his account made double charges, to a large amount, of moneys paid, and also charged as paid by him, to a large amount, moneys which had been in fact paid by the treasurer, and that these errors, overcharges and omissions amounted to some \$1,910.99. These errors were admitted by Mr. Force before the bill was filed, but he charged against them certain items of moneys paid by him for which he had never received credit from the proprietors, amounting to \$634.02, which, according to his contention, showed that the errors would amount to \$1,276.97 as against him, and alleged that he paid that sum of money to the complainants.

Complainants by their bill further charge that he was not entitled to commissions on the sale to Culver and Wright in the spring of 1884, a year before the sixty per cent. contract was made. But they say, further, that if he is to be credited with commissions on that sale, his mode of stating it is incorrect in

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this, that he should have charged himself with the whole \$2,600, and with eighty per cent. of the \$600, amounting to \$480, which, upon his own statement made at the time, was expended in surveyors' fees, &c., paid to Mr. Irons, so that the whole charges would be \$3,080, and the credit to him would be sixty per cent. of the \$2,600—\$1,560—and \$500 paid to Mr. Irons, making \$2,060, leaving a balance due the proprietors of \$1,020 out of the \$2,600, instead of \$800, as the result of his mode of stating the account. In other words, that his mode of stating the account is erroneous as against the proprietors to the extent of \$220.

I think both these points are well taken, and that Mr. Force cannot, under any construction of the resolution, claim any commission on this sale to Culver and Wright; and further, that if he is entitled to it, the account should be stated in the way indicated. That he himself so understood it is manifest by a partial account in his handwriting, produced by the complainants, in which he charges himself with the Culver and Wright sale at \$2,600, as it should be.

The complainants charge—and their charge in that behalf resulted in much argument—that these mistakes in the account were intentional on the part of Mr. Force, and therefore positively fraudulent. On the other hand, it is argued that they were purely accidental, and due to the loose manner in which the proprietors did their business and kept their accounts. But I think the defendants' position on that point is without the least foundation. The cash business of the proprietors had been conducted by a treasurer who had kept his accounts in a businesslike manner. Mr. Force, as we have seen, of his own accord, and, as clearly shown by the correspondence, for his own ulterior purposes, assumed to ignore the treasurer, and received and disbursed these moneys himself. Now, he is admitted upon the record to have been a man of mercantile and general business experience, and it certainly appears by the documentary evidence that he was a man of great acuteness and general intelligence. All his payments seem to have been made by checks, and I am unable to see how there could have been the least difficulty in his making up an account against the proprietors that would have

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been free from any mistake. The mode proposed in his letter to Professor Cook of May 6th, 1886, would have so resulted, and from a careful examination of the account itself, and the vouchers upon which it is based, it seems to me to indicate that it assumed the shape it did on purpose to confuse and mislead. An account better adapted for that purpose I have never seen. The vouchers of the surveyors, &c., are so arranged as to make it difficult to understand it. Nor was it gotten up hurriedly. We have already seen that he took considerable time to prepare it, and his letter to Professor Cook of July 22d, 1887, shows that he knew that of the sum which he charged to the proprietors as paid by him \$425.17 had been actually paid by the treasurer, and that he was then engaged in making up his account, which was presented to the council the next October.

But I consider the question of actual fraud in preparing the account of little consequence. The complainants pressed it in answer to the point made by the defendants that the account had been submitted and acquiesced in by the proprietors to such an extent as to make their conduct a bar against their further questioning it. I am unable to accord to the defendants the benefit of acquiescence to that extent. The fact is that during Professor Cook's life he and Mr. Force had complete control of the affairs of the proprietors, and managed to have a majority of the executive committee and of the council in their favor. All the circumstances and correspondence show that Professor Cook was colluding with Mr. Force to have his account passed as presented, and no doubt the council listened to his suggestions and advice as coming from a disinterested person, which they supposed him to be, while in truth he was not disinterested, but, as we have seen, was directly interested in sustaining Mr. Force in his position.

No estoppel can arise against the proprietors, because no irretrievable action has been taken by the defendants based upon their silent acquiescence. They acted as soon as they discovered the errors in question, and ascertained their rights under the contractual resolution.

The conclusion at which I have arrived upon all the issues discussed is, in the main, against the defendants. None of the

lands (with the possible exception of a trifle near the southerly end of the Lawrence line) whose sale was negotiated by Mr. Force, and from whose proceeds he claimed sixty per cent., were, in my opinion, within the purview of the contractual resolution as it was explained to the council at the instance, and in the presence, and with the acquiescence, of Mr. Force, and was understood by them. None of the lands, unless it be a trifle, were within the imaginary gore east of the Lawrence line which was claimed by the West Jersey proprietors as the result of the final determination of the boundary between New York and New Jersey, and, as before remarked, the greater part of the lands conveyed were not, properly speaking, unlocated, but were claimed under prior East Jersey locations whose validity was questioned, and the conveyances of them were confirmatory only.

Mr. Force himself prepared the contract, and is responsible for the vagueness, ambiguity and uncertainty of its language, and I think that we should apply here the maxim that "the words of an instrument shall be taken most strongly against the party employing them" (*Broom Max.* 594, 597, 598), and applying that rule, it seems to me difficult to answer the argument of the counsel of complainants made upon the writing itself in connection with the collateral writings, as applied to the subject-matter, both as to the lands properly within the scope of the contract and as to the party who was to bear the expenses of searches, plotting and field work. So plain is this latter to me that if I were constrained to adopt defendants' view of the first part of the contract, I should still feel constrained to charge the accountant with all the expenses of searching, mapping and field work done after the adoption of the resolution.

But these conclusions, though adverse to the defendants, do not, in my judgment, have the effect of entitling the complainants to a decree for all these moneys. Mr. Force undoubtedly did great and valuable services to complainants. But for his energy and shrewd management, most, if not all, of these moneys would never have been received, and there is great force in the suggestion of his counsel that he earned them all. But if that be the fact, and if it be true that all that he received was no more than sufficient to compensate him for his work, it does not

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give him the right to manage, by rather unfair means, to appropriate to himself the whole fund at the expense of the complainants, for he sold these lands as the lands of the complainants, and as their agent and trustee, a position which he voluntarily assumed, upon promise to complainants to give them substantial results.

Nor in my opinion does it, on the other hand, give complainants the right to take all the fund and allow him nothing for his services. They have appealed to a court of equity to enforce a pure equity, and have thereby come under the obligation to do equity.

The question as to what would be equitable in view of the result at which I have arrived was not discussed by counsel, and I am unwilling to determine it without hearing counsel.

I will therefore hear counsel upon the following points:

First. The whole of the consideration money for Dunker and Upper White lakes having come into Mr. Force's hands, is he liable to a decree for the whole, or only for the one-half which he retained?

Second. In accounting for the proceeds of sale of Lake Grinnell, is he to be allowed for the amounts that he paid to Messrs. McCoy and others, his associates in the enterprise?

Third. Upon what basis shall his compensation for all the services which he rendered the proprietors be ascertained?

Having heard counsel upon the questions reserved, I have now to state my conclusions thereon.

We have seen that, with regard to the sale of the lakes, Mr. Force occupied the position of an agent and trustee of the complainant who had been entrusted with the power, and assumed the duty, of selling these lakes on account of, and for the benefit of, the complainant, and that these several sales were, under the circumstances, clear breaches of trust.

Two principles applicable to the case seem well established.

First. That the measure of the equitable damages which a *cestui que trust* is entitled to recover against his trustee as compensation for a breach of trust is, at the option of the *cestui que trust*, (1) the amount the *cestui que trust* has actually lost by the breach, or (2) the amount, if anything, which the trustee

has gained thereby. 2 *Lew. Trusts* (Flint's ed.) *900, *902, *903; *Hill Trust*. *522; 2 *Pom. Eq. Jur.* §§ 1051, 1058, 1080; *Attorney-General v. East Retford*, 2 *Myl. & K.* 35; *Melick v. Voorhees*, 24 *N. J. Eq.* (9 *C. E. Gr.*) 305; *S. C.*, on appeal, 25 *N. J. Eq.* (10 *C. E. Gr.*) 523; *Ackerman v. Halsey*, 37 *N. J. Eq.* (10 *Stew.*) 356; *S. C.*, 38 *N. J. Eq.* (11 *Stew.*) 501.

Second. That a liability to make good a loss resulting from a breach of trust participated in by more than one trustee is both joint and several, so that each guilty trustee is liable for the whole of the loss. And it is difficult to perceive how there could be any other rule, since the liability of two or more persons, which is joint and not several, can arise only out of a joint contract, and a breach of trust is not a breach of contract, but in the nature of a tort. Hence it is probably not necessary in suits founded upon ordinary breaches of trust, and certainly not in those founded on tortious breaches, to make parties all the trustees participating in the breach. The action in such cases resembles that in tort at law. 2 *Pom. Eq. Jur.* § 1081 and note and cases; *Lew. Trusts* (Flint's ed.) *908, *909; *Hill Trust*. *520, *521; 2 *Perry Trusts* § 379; *Story Eq. Pl.* § 213 and note; *Calv. Part.* 299, 300; *Attorney-General v. Wilson, Craig & P.* 1 (at p. 28); *Cunningham v. Pell*, 5 *Paige* 307, 612; *Miller v. Fenton*, 11 *Paige* 18; *Walker v. Symonds*, 3 *Swan* 75; *Wilkinson v. Dodd*, 40 *N. J. Eq.* (13 *Stew.*) 123; *In re Davison*, *L. R.* 13 *Q. B. Div.* 50 (1884); *Ex parte Adamson*, *In re Collie*, *L. R.* 8 *Ch. Div.* 807, 819, 820 (1878), where the learned judge says:

"In cases of fraud, or breach of trust, which is often only one form and instance of fraud, there never was any division of liability between the tort feasons. Every person participating in the tort was liable to make good the whole. The liability of each in equity was for the whole amount. And the proof in bankruptcy was exactly commensurate with that liability, it being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law or in equity was a provable debt in bankruptcy. It is said in the books that debts due by reason of fraud or breach of trust are joint and several. There is here a slight

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inaccuracy. Of course, tortfeasors may be sued all in one action or in several actions, but there is not really or practically any joint liability as distinct from the several liability, except where there is a partnership and a joint estate."

The application of these principles to this case produces the following results:

In the matter of Lake Grinnell, Mr. Force acted without concert with Professor Cook, and instead of having the survey and return signed by Professor Cook as surveyor-general, he signed them as deputy surveyor-general, and assisted Stanton and his associates, including himself, in converting the lake to their use. His duty to complainant was to decline to certify to the return in favor of Stanton, and thereby prevent the title vesting in that gentleman. Instead of that he recognized the survey of Roome, and assisted the syndicate in procuring the rights of location necessary to complete the transaction. All the time he must have known that the affair would not receive the sanction of the council of proprietors if submitted, as it should have been, to that body. And further, he evidently feared that it would not receive Professor Cook's sanction. Here there was a tortuous breach of trust, resulting in the loss to the complainant of this lake. For this breach complainant claims the value of the lake, viz., \$3,000, less \$150, the cost of the Kongleton lot sold with it. That such was its value is shown by its sale for that sum.

Against this view it is urged that Mr. Force was obliged to expend, and did expend, considerable money in carrying the transaction through, namely, the cost of the warrants of location and the amounts paid to McCoy and other members of the syndicate for their services, and so forth. But none of these were necessary expenditures in order to carry through a sale directly by the proprietors to Mr. Burt or to the ice company. They were necessary, if at all, only for the purpose of defeating or avoiding the direct sale to Mr. Burt, which would have resulted from permitting the negotiations based upon Ryerson's survey to be completed in the natural course of business. It was Mr. Force's duty, as a member of the executive committee, to carry on these negotiations and procure from Mr. Burt or the ice company, or both, the best price he could get. The legal presump-

tion is that if he had done his duty in that behalf he would have obtained for the complainant the sum which he realized for himself from the ice company and Burt, namely, \$2,850. Had he done this he would have been entitled to compensation for his services. As, however, he did not do his duty, but the contrary, he is, in accordance with well-settled principles, entitled to no compensation.

I am therefore of the opinion that Mr. Force's estate is liable to pay to the complainant the sum of \$2,850, with interest from the time he received the check from the ice company.

The cases of Upper White pond and Dunker's pond are very simple. In each case the survey was made by Mr. Roome, and the proceeds of sale were divided with Professor Cook. Both transactions were clear breaches of trust. I think Mr. Force must be charged with the full amount in each case, less the amount paid to Roome for making the surveys.

There remains to be considered the question of compensation to Mr. Force for his services in making the several sales of beach property.

In those matters he does not appear to have been guilty of any breach of trust or other misconduct, except what may be inferred from his manipulation with regard to the sixty per cent. contract, and the point taken by complainant's counsel in argument on that point is, in my judgment, not sustainable.

In my judgment, Mr. Force is not entitled to any compensation out of the first sale of \$2,600 to Culver & Wright over and above what he has already received, namely, \$100.

For the balance of the sales, I think his compensation should be arrived at as follows: Ascertain the total amount paid out by the complainant for surveyors' fees in searching, plotting and field work, not including that paid in connection with the first sale to Culver & Wright just mentioned, but including all that was done in searching for lands along the coast, in Sussex, Morris and Passaic counties, and on the Newark meadows; also ascertain the amount actually paid to Mr. Thomas for his services in assisting in the sales; deduct those from the total amount of the sales, not including the first sale made to Culver

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& Wright; ascertain the net balance and credit one-half of it to Mr. Force.

If counsel cannot agree upon the figures for this account there may be a reference to a master to state it upon the principle just stated and to ascertain the balance due from Mr. Force upon that basis.

JOHN LEONARD et al.

v.

CHARLES BOSCH et al.

[Decided November 10th, 1906.]

1. A clause in a charter party that the vessel was to guarantee insurance at lowest regular rates should not be construed to mean that the vessel itself or the owners should provide insurance for which they were to be paid the regular rates, but that the owners guaranteed that insurance on the cargo by the owners thereof was procurable at the lowest regular rates.

2. In an action by the owners of a cargo to recover a deposit made by the owners of the vessel in lieu of insurance, evidence held to require a finding that the depositors and the agent of the owner of the cargo both intended that the deposit should be for the owners of the cargo, and was deposited pursuant to the terms of the charter party in execution of the clause that the charterers were not obliged to begin loading before the deposit in guarantee of insurance had been made.

3. Plaintiffs, being unable to procure insurance on a cargo of scrap iron to be shipped on defendants' vessel, executed a charter party through B., as their agent, providing that the vessel should guarantee insurance at lowest regular rates; that the owners should deposit \$23,000 in lieu of insurance, and that the charterers were not obliged to begin loading until the deposit was made. B., at the time, was traffic manager of a bridge company, which had a contract to purchase the scrap iron from plaintiffs on delivery at the port of discharge, and certain of the correspondence relating to the deposit which passed between defendants and B., through oversight or mistake, was addressed to him as traffic manager of the bridge company, defendants supposing that the latter was the owner of the cargo.—Held, that such mistake was not in the making, but

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in the execution, of the contract, and that the deposit was in fact made for the benefit of plaintiffs, who were the owners of the cargo.

4. A contract of affreightment commences from the loading of the vessel, from which time each party is bound to the other for the full performance of the contract.

5. Where a charter party required the owners of the vessel to make a deposit in lieu of insurance, and declared that the charterers were to begin loading on the deposit being made, the charterers, on notice of the deposit, and on loading the vessel, took the risk thereof for the entire voyage, and were entitled to the benefit of the security for such period, or until insurance for their benefit was effected by the owners of the vessel.

Heard on bill, answer, replication and proofs.

Eight of the defendants, who were also eight of the eleven owners of a vessel on which complainants shipped a cargo, made two deposits (the first of \$23,000 and the second of \$2,800) with the Camden National Bank, another defendant, and payment of these deposits to complainants John Leonard & Company is sought by their bill. At the time of each deposit the bank signed a letter stating its object. The first letter, dated at Camden, New Jersey, November 1st, 1902, relating to the deposit of \$23,000, was addressed to "Mr. Charles S. Belsterling, Traffic Manager American Bridge Co.," and was as follows:

"THE CAMDEN NATIONAL BANK,

"CAMDEN, N. J., Nov. 1st, 1902.

"Mr. Chas. S. Belsterling, Traffic Manager, American Bridge Co., 259 So. Fourth St., Phila.:

"DEAR SIR—The owners of the bark Primus have this day deposited with us the sum of twenty-three thousand (23,000) dollars, to be held by us to indemnify you in the event of the loss of the cargo of old iron loaded by you in the Primus, according to the terms of a certain charter party executed by L. St. Clare, master, and Paul Nobbe, agent for John Leonard & Company, dated October twenty-second, nineteen hundred and two. Liability in no case to exceed twenty-three thousand \$23,000 dollars. The above-mentioned indemnity from loss is to be and remain in effect, as protection against loss of said cargo, from the time said bark Primus takes aboard said cargo, or any of said cargo is placed on lighters to be delivered on said bark, until full delivery of cargo at Philadelphia.

"Yours truly,

"FRANCIS C. HOWELL, *Cashier.*"

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The second letter, relating to the deposit of the further sum of \$2,800, made twenty days later, is addressed to "Mr. Chas. S. Belsterling," without further description, and was as follows:

"THE CAMDEN NATIONAL BANK,

"CAMDEN, N. J., Nov. 21st, 1902.

"Mr. Chas. S. Belsterling, 259 So. 4th St., Phila., Pa.:

"DEAR SIR—The owners of the bark 'Primus' have this day deposited with us the further sum of twenty-eight hundred (\$2,800) dollars, making in all twenty-five thousand eight hundred (\$25,800) dollars, to be held by us to indemnify you in the event of the loss of the cargo of old iron loaded by you in the 'Primus,' according to the terms of a certain charter party executed by L. St. Clare, master, and Paul Nobbe, agent for Leonard & Company, dated October twenty-second, nineteen hundred and two, liability in no case to exceed twenty-five thousand eight hundred (\$25,800) dollars. The above-mentioned indemnity from loss is to be and remain in effect, as protection against loss of said cargo, from the time said bark 'Primus' takes aboard said cargo, or any of said cargo is placed on lighters to be delivered on said bank, until full delivery at Philadelphia. Penn.

Yours truly,

"FRANCIS C. HOWELL, *Cashier.*"

Complainants, who were the charterers, in fact loaded the cargo, and Belsterling, who was at the time their agent, as well as the traffic manager of the bridge company, acted, or intended to act, on behalf of the complainants in arranging for the deposit, and not on behalf of the bridge company, who now formally disclaim any interest in the deposit.

On a suit at law brought by the complainants against the bank to recover both amounts as due to them on obligations created by these two letters, it was held by the court of errors and appeals, in *Leonard v. Camden National Bank*, 70 N. J. Law (41 Vr.) 660 (1904), that the party indicated by these writings as the beneficiary of the deposit was the American Bridge Company, which company was not a party plaintiff to the suit, and at law could not be substituted for the complainants. The circumstance that the second letter was addressed to Belsterling individually, and that in this second letter the bridge company was nowhere expressly named, was not referred to in the opinion as affecting the construction of the writings in regard to the parties indicated by the writings. It may be that the reference in the second letter to the first deposit, and the further statement

therein, that both deposits were held as one sum "to indemnify you in the event of the loss of the cargo loaded by you," was considered as requiring both letters to be construed together as intended on their fact for the benefit of the bridge company. Unless this view was taken, it is difficult to distinguish the case, so far as it relates to the construction of the written instruments, from the cases of *Kean v. Davis*, 21 N. J. Law (1 Zab.) 683 (*Court of Errors and Appeals*, 1847) and *Isham v. Cooper*, 56 N. J. Eq. (11 Dick.) 398, 410 (*Court of Errors and Appeals*, 1897), where the written instruments were held to be equivocal on their face and the subject of oral explanatory evidence in a court of law. It was said in the opinion of Mr. Justice Dixon, in *Leonard v. Camden National Bank*, "that perhaps a court of equity might be persuaded by extrinsic circumstances that the real purpose of the parties was to protect the owners of a certain cargo shipped on a vessel owned by the depositors, whoever they might be, and thus, by reformation of the writings, secure indemnity to the plaintiffs as such owners." It was also held that the fund deposited with the bank belonged to the depositors, subject only to the claim of the beneficiary to indemnity, and that the right of the complainants to the fund should not be established in a proceeding to which the depositors were not parties. It was further held that the sole obligation of the bank was to hold the fund until the rights of the claimants were settled *inter sese*, and then to surrender the fund to the rightful claimants, and that a court of equity could give the appropriate remedy. The complainants' bill was thereupon filed against the depositors of the money, as well as the three owners of the vessel, and against the bank and the American Bridge Company, being all of the parties who have or may claim any interest in the deposit. The bill alleges the execution of a charter party between the owners of the vessel and the complainants, who were the owners of a cargo to be shipped by the vessel, in which charter party there was an agreement by the owners to deposit the sum of \$23,000 with a depositary, in lieu of insurance, and that the deposits in question were made in pursuance of this agreement. This agreement was as follows:

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"Vessel to guarantee insurance at lowest regular rates. Charterers not obliged to begin loading before deposit of twenty-three thousand dollars (\$23,000) in guarantee of insurance has been made. Vessel responsible for any expenses caused by delay in making said deposit."

It is alleged that, in arranging with the owners the details for this deposit, Belsterling, who was the agent for complainants, acted for them; that Belsterling was at the same time also an agent (traffic manager) of the American Bridge Company, and that through oversight or mistake a portion of the correspondence was addressed to "Chas. S. Bersterling, traffic manager American Bridge Company," and that the contract of deposit was made not for the benefit of American Bridge Company, who had no interest in the deposit, but for the complainants, the owners of the cargo, as the owners of the vessel well knew. It is further alleged that the vessel with its cargo was lost on the voyage, and the deposit is payable to the complainants. The bill prays a reformation or correction of the letter or letters evidencing the contract between complainants and the bank, so as to express the fact that Bersterling was acting as complainants' agent, and not as agent of the bridge company, that the latter company may be declared to have no interest in the fund, and that the bank may pay it over to complainants, as the vessel with its cargo was worth more than the amount of deposit.

The bank, denying all knowledge of the circumstances of the shipment, admits holding the deposits on the terms and conditions set out in its letters to Belsterling, but says that at the time of the deposits it was informed that Belsterling was the traffic manager of the American Bridge Company, that it was not informed that he was the agent of the complainants, and did not know that he was acting for them, and that the address of the letter to Belsterling as traffic manager was not through oversight or mistake on its part. It admits, however, that it holds the money as depositary or custodian and is ready to pay it over as directed by the court. The American Bridge Company files an answer and disclaimer under its seal, disclaiming any interest, past or present, in the fund. The depositors of the fund (being eight of the eleven owners of the vessel) deny that it was agreed that the owners of the vessel should cause the deposits of \$23,000

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to be made in lieu of insurance, and allege that the only agreement made with the complainants was the charter party set out in the complaint, made between complainants and the owners by their agents; they admit the deposit of \$25,800 in the bank "and deny that it was in pursuance of any other arrangement or agreement than that mentioned in the charter party." They deny that the deposit was arranged with the complainants, or with Belsterling as representing them, and allege that it was arranged with the American Bridge Company, through its traffic manager, Belsterling, without any knowledge or information or understanding that Belsterling in any way represented complainants.

They further allege that they meant and intended the letters in question to be written to the American Bridge Company, and that the bank in so writing them followed the instructions of the trustee of defendants, acting for them on making the deposit, except that in writing the second letter the instruction to address to Belsterling as traffic manager American Bridge Company was not followed, and it was addressed to him individually.

While the bill prays for the special relief of reformation of the letters in question, it also prays payment of the deposit to it, and adds the prayer for general relief. If, therefore, on the whole case disclosed at the hearing it is entitled to such payment, whether or not the letters be corrected or reformed, such relief will be within the scope of the pleadings.

Messrs. McCarter & English, for the complainants.

Mr. Donges and Mr. French, for the defendants Bosch and others.

Mr. Howard M. Cooper, for the defendant Camden National Bank.

EMERY, V. C. (after statement of issues).

The questions involved are mainly questions of fact, and to determine precisely the bearing and effect of these letters relating to the deposits upon the rights of the parties, it will be neces-

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sary to examine in detail the circumstances under which they were made, including especially the previous writings passing between the parties or their agents, whether executed or not.

[After an examination of the evidence the opinion proceeds]:

Reviewing the entire evidence in the case, the written documents, executed as well as unexecuted, and the oral evidence bearing upon their execution, I reach the conclusion that in arranging for the deposit, Belsterling, on the part of the shippers, and Dr. Donges and Mr. Ferris, on the part of the owners, both intended that the deposit was to be made in pursuance of the terms of the charter party and in execution of the clause contained in the charter party that "the charterers not obliged to begin loading before deposit of \$23.000 in guarantee of insurance has been made." The charter party itself not expressly providing for the precise form of the deposit, or for the execution of any further writing expressing its terms and scope, these terms and the scope of the guarantee were afterwards defined by the mutual agreement of both parties, evidenced by the certificate of deposit signed by the cashier of the bank, after these terms and conditions had been expressly discussed, and, in one particular point, changed after the first draft. It was not intended that any formal or written agreement between the parties themselves as to the deposit or its terms should be executed, but both parties understood the deposit to be the satisfactory execution of the contract relating thereto contained in the charter party, so far as related to the terms or scope of the indemnity. And I further find that both Belsterling, as complainants' agent, and Dr. Donges and Mr. Ferris, acting on behalf of the owners of the vessel, intended that the deposit should be made in order that the cargo might be loaded on the vessel and become subject to the terms of the charter party for the common benefit of the charterers and the owners of the vessel, and that the cargo was loaded by the agent of complainants at Havana in the belief on the part of both the shippers and the owners' agents that the same was loaded under the protection of a deposit under the charter party.

I conclude also that in contracting for and arranging the deposit both Belsterling, and Dr. Donges and Mr. Ferris for the

owners, intended the deposit to be made for the benefit of the owners of the cargo, and that Belsterling on his part, throughout the negotiations, acted, and intended to act, solely as the agent of John Leonard & Company as the owners of the cargo, and that on giving the orders to load the vessel, after receiving the letters of the bank, he supposed that John Leonard & Company, as the loaders of the cargo, were secured by the deposit as made for their benefit as loaders under the charter party. I find also that through mistake, due to oversight, Belsterling, at the time of directing the loading of the vessel, in completion of the owners' duty under the charter party, did not notice that the letters, by reason of the form of address, indicated, or might be construed to indicate, that the American Bridge Company was the person or party to whom the letters were directed, and for whom they were intended, as the loaders of the cargo, under the terms of the charter party, and that he accepted the letters and directed the loading under this mistake or misapprehension of their character or legal effect.

On the other hand, I find that Dr. Donges and Mr. Ferris also intended to make the deposit to carry out the provisions of the charter party that the terms and conditions of the deposit (as to the extent of the guarantee) were evidenced by the certificate, and that they also intended that the deposit should be made for the benefit of the owners of the cargo as charterers of the vessel. I further find that through some mistake or misapprehension, the cause of which has not been clearly disclosed, the address of the certificate or letter was written in the form adopted. There is no evidence whatever, on either side, of any oral discussion of the question of the ownership of the cargo, as between John Leonard & Company and the bridge company, pending the negotiations for the deposit, or of any reference to the ownership by the bridge company previous to the address on the first letter. In delivering the letters of the bank, or causing them to be delivered, to Belsterling, I think the owners intended an execution of the contract relating to deposits in the charter party, and that their trustee made the deposit for the benefit of the American Bridge Company, as the persons supposed to be the owners of the cargo, and for whom John Leonard & Company, the char-

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terers, acted as agents. I do not think, however, that the evidence will justify the conclusion that the trustee intended to have the letters addressed to Belsterling as the agent of John Leonard & Company, but that the mistake on his part in reference to the letters was that he supposed the bridge company to be the owners of the cargo, and in that capacity to be entitled to the benefit of the deposit which they had agreed to make in order to get the cargo on board.

This being the mistake of fact which arose in reference to the execution of the letters relating to the deposit, the legal question arises as to its effect on the rights of the shippers and the owners of the cargo to the deposit, on the faith of which the cargo was loaded on the vessel by these owners, the complainants. If the letters were written contracts between the owners and the charterers relating to the deposit, the case, as to reformation of the letters, might perhaps come within the application of the rule that although rescission of a written contract may be granted on proof of mistake of one party, reformation of a written contract cannot be made except upon proof of a mutual mistake. *Green v. Stone*, 54 N. J. Eq. (9 Dick.) 387, 395, &c. (*Court of Errors and Appeals*, 1896); *Herron v. Mullen*, 56 N. J. Eq. (11 Dick.) 839 (*Court of Errors and Appeals*, 1898); *Lutjen v. Lutjen*, 64 N. J. Eq. (19 Dick.) 773, 778 (*Court of Errors and Appeals*, 1902). The letters, however, were not, in form, and were not intended by either party to be, written contracts between the parties themselves relating to the deposits, but were, and were intended by both parties to be, acts in execution of the written contract relating to the deposit made by the charter party. Therefore the substantial and real question in the case is whether, notwithstanding the mistake or misapprehension on one side as to the address of the letter, and on the other as to the bridge company's ownership of the cargo, the complainants have, on the whole evidence, an equitable interest in this deposit as a deposit made to carry out the contract of the charter party relating to the deposit. As between the bank and the person to whom it was delivered, the certificate of deposit is conclusive evidence of their legal relation, but as between the shippers and the owners, no written agreement relating to the deposit was made

or executed, and the letters are only evidence in connection with the other evidence in the case as to the relation which these parties sustain to each other in reference to the deposit. Both parties now prove by oral evidence, outside of the letters, that as between each other they agreed that the terms and extent of the guarantee or indemnity should be as stated in the letter of the bank, and both sides agree in their evidence that the deposit was made in order to procure the loading of the vessel by the owners of the cargo. Therefore the mistakes in the address of both of the letters of the bank were not mistakes in any written contract between the parties, which are to be reformed, but are mistakes made in attempting to carry out a previous written contract by the charter party for a deposit, without which the owners' vessel would not have been loaded, and on the faith of which its loading was secured. So far as the owners of the vessel and the shippers, by themselves or through their agents, agreed on the terms and conditions defining the extent of the guarantee by the deposit, which terms are evidenced by the letters which both parties agreed on, the deposit so limited must be taken as a further limitation or definition of the contract for guarantee, and to bind both parties as to what in this respect the execution of the charter party requires.

As to the beneficiaries of the deposit, both parties agreed and intended that it should be made in execution of the charter party, and for the benefit of the owners who were loading the cargo under the charter party. The mistake of the owners of the vessel, or their agent, in directing the letters of the bank relating to the deposit, to be addressed to Belsterling individually, or as traffic manager of the American Bridge Company, as the person whom they supposed to be the owners loading under the charter party, and the mistake of the owners' agent in overlooking this address, prevented, perhaps, an actual concurrence or meeting of the minds of the owners of the vessel and of the cargo, in reference to the person who should be indicated, in the letters of the bank, as the owner, but this failure of the minds of the parties to agree did not annul or render ineffective the contract for the deposit itself, as made in fact for the purpose of carrying out the charter party and for the benefit of the owners loading on

2 Buch.Leonard v. Bosch.

the faith of it. The deposit being clearly made, and admitted to be made by the owners of the vessel or on their behalf, to secure the loading of the vessel by the charterers under the charter party, I think the latter are entitled to hold the deposit as so made for their benefit, without regard to any mistake made either by the bank or the owners in addressing the certificate or letters relating to the deposit to another party. The original proposal of Nobbe was that a deposit should be made in the name of John Leonard & Company. Suppose that a deposit had been made, intended to secure the owners, not in the name of John Leonard & Company, but in the name of a third party, who had no interest in the fund, whose name had been given by mistake of the owners of the vessel, and not corrected by the shippers through another mistake, could not Leonard & Company have shown that the fund was intended to carry out the contract with them and for their benefit, and have enjoined the third party from withdrawing the fund?

Counsel for the owners admitting that the deposit was made to secure the loading of the vessel, contend that this was the sole object of it, and that this having been effected, the terms of the letter (including its address, as being solely for the benefit of the bridge company) must be considered as alone defining its beneficiaries as well as its terms; that John Leonard & Company, being no parties to the letter or the contract created thereby, have no interest in the deposit, and that the only contract between complainants and John Leonard & Company is the contract to make a deposit in guarantee of insurance, which contract is still outstanding and unperformed, and for breach of which contract complainants have still an action at law. But this view overlooks, I think, the real situation as to this deposit and its substantial aspect as intended to be in performance of the charter party. And it overlooks, also, the distinctive character of the contract of affreightment made by the charter party and the effect of the loading under it. Such contracts commence from the loading of the vessel, and from the time the cargo is delivered to the vessel each party is bound to the other for the full performance of the contract. 3 *Kent Com.* 208; *The Eliza Lines* (United States Supreme Court, October Term, 1905), 199

U. S. 132. After loading the master was obliged to perform the voyage, and the charterers, on their part, were bound to allow the cargo to proceed. Therefore the provision that the charterers were to load on deposit, compelled them, on loading, to take the risk of the vessel for the whole voyage, and they must, under the contract, be entitled to the benefit of the deposit as security for the whole voyage or at least until insurance for their benefit was effected by the owners of the vessel. The obligation of the shippers to procure, or attempt to procure, insurance for themselves, expired when the deposit was made, and the owners of the vessel not having themselves subsequently procured or intended insurance on behalf of the shippers, no question arises as to the right of the owners to withdraw the deposit, or of the shippers to be protected by it. The extent to which they were to be protected was fixed by the mutual agreement of the parties on making the deposit, and was expressed in the letters of the bank. The complainants must be declared to be the beneficiaries of this fund as owners of the cargo loaded on the vessel, and the bridge company not to have any interest in it. The equitable jurisdiction in the case is based, as it seems to me, on the second ground stated in Mr. Justice Dixon's opinion, viz., that the obligation of the bank created by these letters was to hold the fund for the settlement of the rights of the claimants *inter sese*, and then to surrender the fund to the rightful claimant, a remedy appropriate only to a court of equity. A reformation of the letters is not, as it seems to me, either required for the purpose of declaring the rights to the fund or appropriate to the relief.

I will advise a decree directing that complainants, as owners and shippers of the cargo, are the persons entitled to be secured by the deposit, and directing payment to them of the value of the cargo, less the rates for insurance. If there is any dispute as to this value on the evidence taken at the hearing, I will settle this question at the settlement of the decree.

2 Buch.Van Wagenen v. Bonnot.

HENRY W. VAN WAGENEN, administrator of John Whitehead,
deceased,

v.

ROSE M. L. BONNOT et al.

[Decided November 22d, 1906.]

1. Under *P. L. 1900 p. 363 § 4*, excluding testimony by a party to an action as to a transaction with a decedent, a party seeking to establish a gift *causa mortis* was not competent to testify to the delivery of a package to her by the deceased, but might testify as to what occurred after carrying the package out of the room in which it was claimed delivery was made.

2. The return of a package containing an alleged gift *causa mortis* to the donor was a resumption of possession and, *ipso facto*, a revocation of the gift.

3. Savings bank-books are proper subjects of gifts *causa mortis*.

4. Evidence considered, and held to establish a gift *causa mortis*.

Heard on bill, answer, decree of interpleader, statements of claim and proofs.

Mr. Edwin G. Adams, for the complainant.

Mr. Louis Hood, for the defendant Bonnot.

Mr. Alfred F. Stevens and *Mr. Frederick F. Guild*, for the defendant Guild, substituted administrator of Minnie A. Harrison.

EMERY, V. C.

This is a bill of interpleader filed by the administrator of John Whitehead, deceased, who has, under a decree of interpleader made in this cause, deposited in court four savings bank-books, which were in Mr. Whitehead's possession at the time of his death, and came into the possession of complainant as his

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administrator. Three of the books were savings bank-books issued to Minnie A. Harrison and standing in her name in three different savings banks: Franklin Savings Institution, of New-ark, for \$4,307.15; Seamen's Bank for Savings, New York City, \$2,173.50, and Greenwich Savings Bank, New York City, for \$2,960.57, a total of \$9,441.22.

Minnie A. Harrison died intestate on December 16th, 1902, and on December 23d, 1902, Mr. John Whitehead was appointed her administrator. He subsequently had a new deposit-book issued to himself as administrator, for the deposit in the Franklin Savings Institution, and this book also is deposited in court. The defendant Mrs. Bonnot claims that the three deposit-books issued to Miss Harrison belong to herself, by virtue of a gift or donation *causa mortis* made to her by Miss Harrison two days before her death, and that shortly after Miss Harrison's death, and before Mr. Whitehead's appointment as administrator, she delivered these three books to Mr. Whitehead in his personal capacity as her bailee or attorney. She subsequently brought a suit in replevin for the books against Mr. Whitehead personally, in which suit he set up title to the books in himself as Miss Harrison's administrator. This suit was pending at the time of Mr. Whitehead's death, and the defendant Mr. Frederick F. Guild, having been appointed substituted administrator of Miss Harrison, demanded of complainant, Whitehead's administrator, the possession of the books, whereupon this bill was filed, the suit by Bonnot enjoined, and the defendants, after hearing, directed to interplead.

The three deposit-books issued to Miss Harrison belonged to her, and the question in the case is whether Mrs. Bonnot has satisfactorily proved a gift or donation of them to her *causa mortis*. The alleged gift was made to Mrs. Bonnot personally by Miss Harrison during her last illness, about two days before her death, and in the presence of one of the daughters of Mrs. Bonnot, a young girl then about sixteen years of age. Under our Evidence act (*Rev. 1900, P. L. p. 363 § 4*), excluding testimony by any party to the action as to any transaction with the intestate, this daughter's testimony is the only legal evidence of this transaction between Miss Harrison and Mrs. Bon-

2 Buch.**Van Wagenen v. Bonnot.**

not, and it is the only evidence which has been offered for that purpose. On her evidence, the first question fairly raised is whether it sufficiently proves that the books in question were in an unopened parcel or package delivered to Miss Harrison by Mrs. Bonnot as the gift in question. Her account, taken from her whole evidence, direct as well as cross-examination, and the evidence of the other witnesses, so far as it bears on the question of the contents of the parcel, is substantially as follows: Mrs. Bonnot's house on Orange mountain was a short distance from Miss Harrison's, and the daughter was at the house of Miss Harrison and in attendance on her from the Friday preceding Miss Harrison's death on Tuesday, continuously, with the exception perhaps of a few minutes each day and ten or fifteen minutes on Sunday, when she went to her mother's home on an errand. Mrs. Bonnot herself was at Miss Harrison's continuously from Saturday morning until eleven or twelve o'clock on Monday morning. Miss Harrison, who was an invalid suffering from consumption, had been failing for two or three weeks, and since this Friday had been confined to her bed. She had lived alone from the June previous without any companion or attendant other than Miss Bonnot. There is some dispute in the evidence as to how much of the time Miss Bonnot was there during the spring and summer previous to the last illness, but this is not material for present purposes. On Saturday morning Mrs. Bonnot came to the house, got tea for Miss Harrison and gave it to her in bed. This bed was in the kitchen, where Miss Harrison usually slept, it being the warmest and most convenient room in the house. It opened on a porch enclosed by lattice-work and locked, and a window, under or by the side of which the bed stood, opened on this porch. Before the time of the alleged gift there was a conversation between Miss Harrison and Mrs. Bonnot about Mrs. Bonnot's affairs, brought on, as the daughter says, by Miss Harrison noticing that her mother seemed worried. Mrs. Bonnot said she was worried about the interest on the mortgage on her house, which she had not been able to pay because of not getting money due to her, and because the persons who held the mortgage were pressing for the principal, \$1,000 or \$1,500. Miss Harrison then spoke about the trouble she

herself had in collecting the interest on one of her mortgages given by a Mr. Richards, and Mrs. Bonnot requested or suggested to Miss Harrison to transfer this mortgage to her property, as it was just the amount she wanted. Miss Harrison said she would see about it. The Richards mortgage, as appears from the inventory, was a \$1,500 mortgage. After Mrs. Bonnot had been there about two hours, Miss Harrison from her couch called to Miss Bonnot, asking if she was there, and, receiving her reply that she was, said, "I want your mother's house to be free; I want her to rest." Miss Harrison then turned to Mrs. Bonnot, told her to reach back of her and get a package from beneath her pillow, or to help her get something from beneath her pillow. Mrs. Bonnot reached back beneath the pillows on the bed and handed a package to Miss Harrison. It was a long package, wrapped up in a very soiled cloth. Miss Harrison took it in her hands, felt of it and passed it into Mrs. Bonnot's hands, and said, "Take this; they are yours; you will find they will be valuable to you." The package was not opened. Neither was anything said at the time as to what was in it, nor could the witness tell, from the shape, form or appearance, what was in it. Mrs. Bonnot took the package, went out on the porch and hung the package on the ear or hinge of the blind of the window opening on the enclosed porch. Miss Bonnot says that it was hung outside on the porch because it was rather filthy and unhealthy. Miss Harrison expectorated a great deal, and it was unhealthy to have it in the room, and Mrs. Bonnot, whose evidence as to what occurred outside of the room is admissible, says that the bundle looked like a bundle of rags, and that she kept it on the back porch with some other rags she had put out while Miss Harrison was sick. She also says she did not know it contained bank-books. After the bundle or package had been hung outside,

"When she came in, Miss Harrison asked mother where she had put them, and mother said, 'I hung them outside near the blinds; they are safe out there.' Miss Harrison looked through the window to see if they were there, and seemed rather anxious about their being out there, and then mother told her they would be all right there."

Miss Harrison, as the witness says, during the afternoon laughed as if she were having a joke to herself. "Now," she

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says, "I want you to rest," after she had given her the package and mother put it outside. No further conversation took place about the package until Sunday morning, up to which time it remained on the porch. On Sunday morning, between nine and eleven, or between eleven and twelve (the witness gives both hours), Miss Harrison directed the bundle to be brought to her. Mrs. Bonnot brought it into the room and handed it to Miss Harrison, who was still in bed. Miss Harrison handed it back to Mrs. Bonnot again, and she said, "Take them; they are yours." Mrs. Bonnot said, "Where shall I put them; what will I do with them?" Miss Harrison then said, "Take them; put them in your satchel; they are yours." The parcel was not unwrapped or opened or the wrappings changed on Sunday. Neither was anything said by Miss Harrison at the time of this second delivery about the contents of the parcel. After this second delivery, however, and during the afternoon, Miss Harrison, according to the witness, said "she knew mother could rest now." And the witness also says that when the package was delivered on Sunday, Miss Harrison said, "This will do it." No further reference was made to this parcel by Miss Harrison during her life. On Sunday morning, previous to this incident, Miss Harrison had been taken with a severe coughing fit, and, as Miss Bonnot thought, had coughed up part of her lung, and she so told Miss Harrison, who then said she knew she was going to die. Mrs. Bonnot, with her daughter, spent the day and night with Miss Harrison, and during the day there was considerable conversation about Miss Harrison's wishes in regard to Mrs. Bonnot's daughters and their education, and about one or two other persons whom she wished to be remembered. On Monday morning Mrs. Bonnot and her daughter rose about seven o'clock, and after giving Miss Harrison her breakfast and making her comfortable, a long conversation occurred about Miss Harrison's wishes in relation to the disposition of her property, and at her direction Mrs. Bonnot wrote down on a slip of paper her wish in regard to it, which was read over to Miss Harrison and read by her and then signed. This paper was to be taken to Mr. Whitehead, and immediately after it was drawn Mrs. Bonnot left Miss Harrison and came to Newark and delivered the paper

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at Mr. Whitehead's office on Monday afternoon. Arrangements were then made by her that a will was to be drawn, and Mrs. Bonnot was, as she thinks, to meet, at Miss Harrison's on Tuesday afternoon, someone from Mr. Whitehead's office with the will. This original paper, signed by Miss Harrison, has been lost, but a copy was preserved among Mr. Whitehead's papers, and is as follows:

"DECEMBER 15th, 1902.

"ST. CLOUD, WEST ORANGE.

"This is my last wish. I wish that Madame Bonnot's house be cleared of debt and anything else she wants, books, furniture. She is to pay my lawful debts and whatever she disposes of is all right. Don't wish my relatives, Mr. Flavel, nor, above all, Miss Davy, to meddle in my affairs. I wish Mr. John Whitehead to do it for Madam Bonnot.

"M. A. HARRISON."

A will was drawn by Mr. Whitehead, dated December 17th, 1902, but was not executed, as Mr. Payne, the partner of Mr. Whitehead, did not reach Miss Harrison's until after her death, and perhaps not until the afternoon of Wednesday, the day the will was dated.

Mrs. Bonnot did not return to Miss Harrison's until Tuesday afternoon, about four or five o'clock, just after Miss Harrison's death. As she came near the house she met her daughter, who had stayed there alone from the time of her mother's departure on Monday until the end, and was then going away ill. Mrs. Bonnot went into the house and was there alone, or with another daughter, until the body was removed the next day to an undertaker's. She also remained on at the house from that time until about January 7th. On Thursday, the day of the funeral, she was at the home in Newark of another daughter, and the daughter Ernestine was also at the house. She says that she was in another room, and hearing an exclamation from her mother, went into the room where the latter was. Her mother then showed her the three bank-books. She said she had just opened the package, and it was on her knees. There was the dirty cloth around it, and there was something else wrapped around it—a paper or piece of chamois, or maybe another small cloth. It was evident that the daughter did not at this time see the parcel or package in the original condition in which it was delivered.

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The exclamation of her mother followed and evidently did not precede the opening of the parcel. The evidence of this witness, therefore, fails to show that the parcel up to this time retained its original form or appearance at the time of the delivery to Mrs. Bonnot. The direct proof that these books were in this parcel at the time of the delivery of the parcel to Mrs. Bonnot by Miss Harrison on Sunday depends entirely, therefore, on the evidence of Mrs. Bonnot herself. The title must be derived from the delivery on Sunday, for the return of the package to Miss Harrison by her direction on Sunday morning was a resumption of possession by her, and, *ipso facto*, a revocation of the gift of the previous day, so far as delivery under it was concerned. The conversation on Saturday may, however, be important as bearing on the delivery on Sunday. Miss Bonnot's account of the transaction on Sunday ends with the deposit of the bundle in her mother's satchel in Miss Harrison's presence, and from the time of this deposit she does not speak of seeing the bundle or the satchel again before her mother left the house on Monday morning. Mrs. Bonnot says that the bundle stayed in that satchel in Miss Harrison's room until the next morning (Monday). She further says that on Monday morning she brought the bundle to Newark and put the bundle in a room at the house where another of her daughters was living. Whether the bundle was brought to Newark in the satchel is not directly stated, but from the fact that Mrs. Bonnot also says that on the day she opened the bundle (Thursday) she had it in her satchel, and took it from where she had it and opened it, it may fairly be taken as proved by her that on Monday she brought the satchel, with the bundle, to Newark. On opening the bundle on Thursday she does not speak of anyone being present, or of her daughter Ernestine seeing it opened. She says that up to that time there was no change made in the appearance of the bundle from the time she first put it on the back porch on Saturday. She opened the bundle and saw the three books in question, and says that up to that time she did not know what was in the bundle, and had not seen the books. A piece of white paper without writing on it, so far as she noticed, was wrapped up with the books. She threw the soiled rag away, wrapped the bank-

books in wrapping paper and took them to Mr. Whitehead's office the same day, and there delivered them to Mr. Fleischel, a clerk in the office, or to Mr. Payne, Mr. Whitehead himself being absent or engaged. She subsequently, and about January 11th, 1903, made a formal demand in writing upon Mr. Whitehead for the return of the books, which was refused. The circumstances relating to the draft of the will do not bear directly on the question of the contents of the parcel, but as the only direct proof of the contents is the evidence of Mrs. Bonnot, these circumstances have a bearing as showing her conduct relating to the deceased or her property after the alleged gift. In *Cosnahan v. Grice*, 15 Moo. P. C. C. 215; 2 Ch. Eq. Dig. 2012, it was said that in this class of cases the whole conduct of the parties at the time must be minutely examined, for, on a question of doubtful right, it is impossible not to take into account the conduct of a party at the time when the right becomes first capable of assertion and not to allow its due influence in raising a presumption in favor of or against the claim. The conduct of the donee in taking other property of the deceased after her death was given weight in this case in determining adversely the question of a donation *causa mortis*. In the present case I had a strong impression at the hearing that Miss Bonnot's evidence was not a fabrication, but was truthful and entitled to credit, and I still retain this conviction after a reading and further consideration of her evidence. But considering her testimony as furnishing the clear and satisfactory evidence required in these cases of the delivery of the package to Mrs. Bonnot and the gift to her of its contents, the question remains, What was in this unopened parcel? And as to this the case depends on the credit to be given to Mrs. Bonnot. The parcel was in her possession, unseen by any other person, apparently from Monday morning until Thursday. She was alone in Miss Harrison's house, or with another of her daughters, who has not been called as a witness, from Tuesday afternoon or evening until Thursday, and if it had been proved that during this interval there were in Miss Harrison's house any other securities which could have been added to or substituted for the contents of the bundle, I am inclined to think that under such circumstances a court

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would scarcely be safe in relying on the evidence of the donee alone for identification of the contents. Miss Harrison had, as appears from the inventory of her estate, other securities—two bonds and mortgages, one of \$10,000, one of \$1,500, and five bonds, three of the United Electric Company, par value, \$2,000; two of a street railway company, par value, \$2,000, and apparently had no other securities except the savings bank-books. The \$1,500 mortgage was in course of foreclosure, and probably in the custody of Mr. Whitehead, her counsel. The location of the other mortgage and the bonds at the time of her death has not been shown, and a substitution by Mrs. Bonnot of the savings bank-book for these, or any one of them, if she would be guilty of this, could not therefore be assumed, especially so, as securities of this character are usually or often left with attorneys or agents, while savings bank-books, being usually available only to the person, are oftener kept in personal control, and if so kept by Miss Harrison, the probability is that all these books would be kept together in one parcel, rather than separately, and the evidence in the case as to Miss Harrison's business habits and character make it very probable that these bank-books at least were kept about her person as described.

On the case as submitted, therefore, the probabilities as to the contents of this parcel tend to support Mrs. Bonnot's statement and to negative the conclusion or assumption that during the interval between Monday and Thursday she tampered with the parcel either by adding or exchanging securities. The case is one where these probabilities must be given due weight, and her entire evidence must also be considered. In reference to one important matter bearing on her conduct, she has not been, as it seems to me, candid or unequivocal. This relates to the draft of the will. In the conversation on Sunday and Monday relating to what Miss Harrison wished to be done, and the persons she wished to be remembered, persons were named and her wishes as to these stated, but the names of these persons were not on the written memorandum signed by Miss Harrison. Mrs. Bonnot, on reaching Newark with this paper, was in great haste to get to Mr. Whitehead's office, as she proves by a Mrs. Wait, to whom she showed the paper before going. She went to Mr.

Whitehead's office, according to her account, but once with the paper, which she left there. She now says that she don't recall seeing Mr. Whitehead at his office that day; that she won't say she didn't see him, but that she don't recollect, and that she don't recollect leaving any message with the paper, except that it was something to be given to Mr. Whitehead, and that Miss Harrison wanted her to leave this, and to "tell Mr. Whitehead to attend to this for you for me." Apparently, from this account, no person in Whitehead's office had received from Mrs. Bonnot any statement as to the contents of the will to be drawn, except the written memorandum. Nor in all probability had Mr. Whitehead himself, for it appears that Miss Harrison, who seldom came down from the mountain, had not been to Newark for three weeks, and does not seem then to have seen Mr. Whitehead. Mrs. Bonnot herself, as she says, often took the business messages from Miss Harrison to Mr. Whitehead. The will, drawn in Mr. Whitehead's hand, on being produced, includes all the persons who were spoken of in the conversation of Sunday and Monday, the persons to be remembered being Mrs. Bonnot's three daughters, Mr. Whitehead and a young man named Lucian Little, none of whom are mentioned in the memorandum. The will includes, besides, a legacy of \$400 to a church, which was not spoken of by Miss Harrison at all. The will, after payment of the debts, directs the payment of \$1,500 to Mrs. Bonnot (the amount of the mortgage on her house, referred to in the memorandum), and after giving specific legacies of jewelry to Mrs. Bonnot's daughters, a legacy of \$1,000 to Mr. Whitehead (the amount spoken of on Sunday and Monday), \$50 to Little and \$400 to the church, she directs the appropriation of a sum sufficient to educate the two daughters (Eulalie and Ernestine), and then gives the entire residue of the estate to Mrs. Bonnot. A careful consideration of the conversation on Sunday and Monday, proved by Ernestine; of the memorandum and the circumstances of its writing, and of the document prepared solely for the purpose of carrying out Miss Harrison's wish, justifies the conclusion, I think, that the written memorandum was drawn to show what was to be given to Mrs. Bonnot *herself*, and further, that this memorandum was to authorize Mr. Whitehead to

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receive from Mrs. Bonnot the directions as to the disposal of Miss Harrison's properties.

From some source, apparently, Mr. Whitehead did receive directions as to all of the persons who were to be remembered. These directions of Miss Harrison were made in the presence of only Mrs. and Miss Bonnot, and Miss Bonnot was not out of the house until after the death. In view of this coincidence, it is difficult, if not impossible, to resist the conclusion that in some way the provisions in the will, which included the directions of Sunday and Monday, were communicated by Mrs. Bonnot to Mr. Whitehead, and still more difficult to conceive that a devise of the entire residue of the estate would or could have been drawn without a direction from Mrs. Bonnot herself, after the memorandum was delivered. Her present statement that she will not say she didn't see Mr. Whitehead, but only that she cannot at present recall it, is not, in my judgment, reliable. She could not have forgotten seeing Mr. Whitehead about drawing a will from this paper. After her departure from the house immediately on its receipt, her haste to reach Mr. Whitehead's office with it, and her appointment for the next afternoon at Miss Harrison's to meet a person with the will, and with this will drawn as it is, it is not credible that in some way not disclosed by her she communicated with Mr. Whitehead about the will to be drawn from this paper. The doubts thrown on her credibility by her testimony upon this subject, bearing as it does on her conduct in relation to the acquisition by herself, or for her family, of the bulk of Miss Harrison's property by will during the time she held the stocks in question, would seriously affect the weight to be given to her evidence as establishing the contents of the bundle if it were shown that after Miss Harrison's death, and while she had the run of her house, there were other securities in the house. But this has not been shown, and as the delivery of the bundle, containing apparently valuable securities, has been satisfactorily proved by the evidence of another witness, and the surrounding circumstances indicate that it was not improbable that all of the savings bank-books were in the bundle, I do not feel justified in rejecting her statement that the books were in the bundle merely on the ground that if they were not

in the bundle she had the opportunity to put them in after Miss Harrison's death, and that her equivocation about procuring a will to be drafted in her favor would justify me in concluding that she would tamper with the bundle and then swear falsely about it. The equivocation may be attributed to an endeavor not to disclose all that took place in reference to the draft of the will, rather than a character which would resort to crime in order to get possession of the books. Counsel for the administrator urges strongly that the memorandum itself, referring as it does expressly to the freeing of Mrs. Bonnot's property from debt, negatives the idea that a gift had been previously made of the books for this object, but I cannot draw this conclusion, or hold it to be sufficient to outweigh the evidence of gift. The memorandum is evidently not a full or complete disposition of her property by Miss Harrison herself, and required a full explanation, which was to be given to Mr. Whitehead, as the proof shows, by Mrs. Bonnot herself. It may have been intended to confirm the gift by will. The point was suggested, rather than insisted on, by counsel that these savings bank-books on their face required an assignment in writing by the depositor in order to transfer the money to another. This assignment relates to an absolute present assignment as between the bank and the depositor, and is only intended to regulate the legal rights of the bank with the depositor. It would operate, in the present case, no farther than to require the use of the name of the administrator for the recovery of the deposit in a legal action. That savings bank-books are proper subjects of donations *causa mortis* by delivery is settled by the weight of authority in the American courts, and the decisions in our own courts in relation to choses in action are based on reasons which include such books. *Corle v. Monkhouse*, 50 N. J. Eq. (5 Dick.) 537, 543, &c. (Vice-Chancellor Van Fleet, 1892); *Travelers' Insurance Co. v. Grant*, 54 N. J. Eq. (9 Dick.) 208, 212, 213 (Vice-Chancellor Pitney, 1896); *Ridden v. Thrall*, 125 N. Y. 572, 577 (1891).

I will advise a decree declaring that Mrs. Bonnot is entitled to the books in question.

2 Buch.Bennett v. Finnegan.

PETER BENNETT

v.

BRIDGET FINNEGAN et al.

[Filed December 11th, 1906.]

1. Limitations do not run against a claim of a husband against his wife during the continuance of the marital relation.

2. Laches will not be imputed to a husband merely from his failure to prosecute a suit against his wife during the continuance of the marital relation.

On demurrer on reargument.

Mr. Adrian Riker, for the demurrants.

Mr. James M. Trimble, for the complainant.

EMERY, V. C.

Reargument of the demurrer was directed in this case upon the defences of statute of limitations and of laches. The conclusions on the former argument are reported in *38 Atl. Rep.* 401.

As to the statute of limitations, I must hold it not applicable. This is on the authority of *Yeomans v. Petty*, 40 N. J. Eq. (13 Stew.) 495, decided by Vice-Chancellor Bird in 1885, and of *Alpaugh v. Wilson*, 52 N. J. Eq. (7 Dick.) 424, decided by the same vice-chancellor in 1894, and affirmed on appeal, for the reasons given by him. 52 N. J. Eq. (7 Dick.) 589. These cases hold distinctly that, so far as relates to claims by the wife against the husband, the statute is not applicable, and they control this case. They were not called to my attention until after the decision on the former argument. It is urged that none of these cases are cases in which the husband was the claimant, but

while this is true, the decisions suggest no distinction in this respect, and the rule is put upon grounds which reach as well to claims of the husband against the wife. The basis of the rule is the general policy of preventing litigation between husband and wife. See *Yeomans v. Petty*, 40 N. J. Eq. (13 Stew.) 498. This reason is operative as well in favor of the husband as the wife. As to the application of the general doctrine of laches, independent of the statute, this is to be governed, as it seems to me, by a principle analogous to that of the application of the statute. *Prima facie*, and in the absence of special equitable circumstances, it is not evidence of laches that either the husband or wife fail to prosecute the other in a court of equity pending the continuance of marital relation. No circumstances appear on this bill which debar the complainant, merely on the ground of lapse of time, from proving, if he can, by competent evidence, that the debt paid by complainant was the wife's debt. And on the contrary, the allegation in the bill of joint possession of complainant and his wife during their lives, and his sole possession since her death, while such possession was no obstacle to the prosecution of a suit in equity, if the husband chose, would seem *prima facie* to be an explanation of the delay. But without deciding as to the effect of this allegation, I overrule the objection of laches, which is made simply on the face of the bill, and I do this upon the ground that no special circumstances appear on the bill which deprive the husband of the benefit of the general rule that the law will not impute laches merely from the failure to prosecute suits pending the continuance of the marital relation.

The demurrer, therefore, must be overruled, with costs, and defendants must answer.

2 Buch.Saldutti v. Flynn.

FELIX SALDUTTI

v.

MAURICE FLYNN et al.

[Decided December 12th, 1906.]

1. An agreement by a husband to convey free of all encumbrance is not satisfied by a mere conveyance containing a covenant against encumbrance, but the vendee is entitled to a conveyance by the husband and his wife before paying the purchase-money, the existence of the wife's inchoate right of dower constituting a breach of covenant against encumbrances.

2. A vendor is in equity a trustee for the vendee from the time of execution of agreement to convey, and failure of the vendee to perform the contract strictly at the time fixed, if the vendor is ready to perform, does not in equity discharge the contract, unless time is of the essence of the contract or the delay has made specific performance inequitable. Hence a vendor agreeing to convey free of all encumbrance is not released from the contract by the refusal of the vendee to accept a deed in which the vendor's wife did not join.

3. Where a vendor agreed to convey free of all encumbrance, but merely tendered a deed in which the wife did not join, grantees in a deed executed and acknowledged by such vendor and his wife, who had notice of such agreement, of the tender of such deed and of the vendee's refusal to accept, so far as the vendor is concerned, hold the legal title as trustees for the vendee and subject to the agreement.

4. Such deed passed the lands to the grantees free of the vendor's wife's inchoate right of dower, and a conveyance by such grantees to such vendee would pass a title to him free from such dower right.

5. Where a vendor and wife sign an agreement to convey lands free of all encumbrance, but the agreement was not acknowledged by the wife, as required by the statute (*P. L. 1898 p. 685 § 39*), the wife was not bound, and the vendee cannot compel her, to convey her interest, and she is entitled to bargain for the sale of her inchoate right of dower as her own property.

6. Where a vendor and his wife conveyed the land to certain grantees who had knowledge of the agreement, and of the vendee's refusal to accept a deed in which the wife did not join, in a suit by the vendee against the vendor and his wife and the grantees for specific performance, the vendee must, as a condition precedent, pay the grantees the value of the wife's inchoate right of dower.

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7. It appearing in such case that the grantees had not paid the wife the value of her inchoate right of dower, the amount should be paid to her, but on the condition that she release the grantees from any further claim to recovery under the agreement.

8. In such case, on the refusal of the wife to execute such release, the payment should be made to the grantees, leaving the wife to her remedy at law against them.

9. The vendee, on payment of such value, is entitled to a reduction thereof from the purchase price payable to the vendor, the grantees are entitled to receive the amount paid the vendor on account out of the purchase-money, and, on the execution of a deed by the grantees to the vendee, the vendor is entitled to receive the balance due him.

On bill for specific performance. Heard on bill, answer, replication and proofs.

Mr. Alfred F. Skinner, for the complainant.

Mr. Chandler W. Riker, for the defendant Flynn.

Mr. John Francis Cahill, for the defendant Mrs. Flynn.

Mr. James M. Trimble, for the defendants Napurano and wife.

EMERY, V. C.

The bill is filed by a vendee for specific performance of an agreement in writing to convey to complainant, for \$4,500, by deed of warranty, free from all encumbrances, a tract of land in Newark. The property belonged to defendant Maurice Flynn, and the agreement, which was made between Flynn as sole party of the first part and Saldutti as of the second part, was signed and acknowledged by Flynn, and recorded. Before the recording it was also signed by Mrs. Flynn, but was not acknowledged by her. On signing the agreement \$25 was paid to Flynn on account of the purchase, and the mortgage and other liens upon the property were about \$2,975, leaving about \$1,500 as the balance of the consideration to be paid on the delivery of the deed. When the time arrived for carrying out the contract, Mrs. Flynn,

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acting in her own interest and under the advice of her own separate counsel, refused to sign the deed unless she received for herself \$500. Mr. Flynn declined to agree to the payment to her of any portion of the \$1,500, and offered to sign the deed without her joining on receiving the entire \$1,500. The complainant declined to pay the whole \$1,500 to Flynn and receive his deed alone. There were two or three meetings between all of the parties and their several counsel, for the purpose of carrying out the contract in a way satisfactory to the three parties interested, but these were unsuccessful. The last meeting was between Flynn and complainant (or his solicitor) only, and at this time Flynn's offer to deliver his deed and complainant's refusal to accept were repeated. The next day after this refusal, and, as complainant claims, pending arrangements for another meeting between Flynn and his wife and the complainant, Flynn and wife conveyed the property to the defendants Napurano and wife for a consideration stated in the deed as \$5,100. At the time of the conveyance \$200 was paid in cash (equally to Mr. and Mrs. Flynn), and contemporaneously a written agreement was made between the parties as to the payment of the balance. This paper recited an agreement to purchase the property for \$5,100, the execution of the deed and the payment of \$200, leaving \$4,900 due; the previous contract of Maurice Flynn with Saldutti,

"which contract is alleged to have been broken by the purchaser, Felix Saldutti, though there may be some question as to the validity of the hereinbefore-mentioned deed, owing to said previous contract,"

and then agreed that in case Saldutti or his assigns should set aside the said deed made to the Napuranos, then Maurice Flynn should repay to the Napuranos the \$200, together with one-half of the costs and expenses in defending the deed; and further, that if the deed should be declared valid, or not questioned for a reasonable period, then the Napuranos should pay the balance of the consideration to the Flynn—\$500 in cash to Mrs. Flynn for her dower rights, and the balance of \$4,400 by assuming the existing mortgage, with interest; \$575 in cash, and \$1,500 by a mortgage, payable in five years, with interest.

Complainant's bill was filed against Flynn and wife and Napurano and wife on January 4th, 1906, the day after the delivery of the deed. On the part of all the defendants it was claimed at the hearing that the contract with complainant was terminated by his refusal to accept Flynn's offer to receive the \$1,500 and, on his receiving it, to execute and deliver a deed for the property, executed by him without Mrs. Flynn joining, but with covenants of warranty.

To this claim there are two answers: *First*. The agreement to convey free of all encumbrance is not satisfied by a mere conveyance containing a covenant against encumbrance, but the vendee is entitled under such contract to a conveyance by the husband *and his wife* before paying the purchase-money. *Young v. Paul*, 10 N. J. Eq. (2 Stock.) 401, 405 (Chancellor William-son); affirmed on appeal (*Court of Errors and Appeals*, 1855). The wife's inchoate right of dower was an encumbrance, and its existence is a breach of a covenant against encumbrances. *Carter v. Denman*, 24 N. J. Law (3 Zab.) 260, 272, 273 (*Supreme Court*, 1852). In the *second* place, a vendor is in equity a trustee for the vendee from the time of the execution of the agreement. *King v. Ruckman*, 21 N. J. Eq. (6 C. E. Gr.) 599, 604 (*Court of Errors and Appeals*, 1870); *Houghwout v. Murphy*, 22 N. J. Eq. (7 C. E. Gr.) 531, and opinion of Justice Depue, 546, 547 (*Court of Errors and Appeals*, 1871). The failure of the vendee to perform the contract on his part strictly at the time fixed, if the vendor is ready to perform, does not in equity discharge the contract, unless by the contract itself, or circumstances proved in the case, time is made or has become of the essence of the contract, or the delay has made specific performance inequitable. This is the radical difference between the equitable and legal rights on failure to perform strictly the terms of such contract. The equitable remedy remains, although neither party was ready on the contract day, and no action at law would lie in favor of either party. *King v. Ruckman*, 21 N. J. Eq. (6 C. E. Gr.) 605; *Zimmerman v. Brown*, 36 Atl. Rep. 675, 677 (*Vice-Chancellor Emery*, 1897); *Freeson v. Bissell*, 63 N. Y. 168, 170 (1875). Flynn therefore was not released

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from the contract by the refusal of the vendee to accept the deed without the wife joining, and the conveyance of Flynn's rights to the land being made to the Napuranos with actual as well as constructive notice, these defendants, so far as Flynn himself is concerned, hold the legal title as trustees for complainant, and subject to complainant's agreement. *Houghwout v. Murphy, supra.*

The deed to the Napuranos, being executed and acknowledged by both husband and wife, also passed to them the lands free of Mrs. Flynn's inchoate right of dower, and if they now convey the lands to complainant the complainant will receive from them a title free from the inchoate dower. Complainant could not have compelled Mrs. Flynn to convey her interest, as the agreement, although signed, was not acknowledged under the statute. *P. L. 1898 p. 685 § 39, tit. "Conveyances;" Goldstein v. Curtis, 63 N. J. Eq. (18 Dick.) 454 (Vice-Chancellor Pitney, 1902); Ten Eyck v. Saville, 64 N. J. Eq. (19 Dick.) 611 (Vice-Chancellor Sterens, 1903).* And Mrs. Flynn, not being bound in any way by the agreement, was entitled to bargain for the sale of her inchoate right of dower as her own property. *Ten Eyck v. Saville, supra.* By the conveyance to the Napuranos this estate is in fact released and discharged altogether, and their conveyance to complainant would convey the property free from this encumbrance, which they have discharged by a purchase and conveyance from the wife. This encumbrance cannot be reinstated or retained by directing the Napuranos to convey only Flynn's former estate in the lands, or to convey the lands subject to this dower, for the wife's inchoate right of dower is an interest, created by operation of law, in lands of which the husband is seized, and it would seem to be beyond the power of a court to create in a third person an estate of this character, and having its incidents, irrespective of the husband's seizin. The experiment of creating such an anomalous interest in lands should certainly not be made, but the equities of the parties should be worked out under the conditions the parties have themselves created, so far as practicable. Defendant's counsel, in view of this status of the inchoate dower right, suggests that in order to

work out the equities in the case a reconveyance to Flynn be directed, the result of which would be to reinstate Mrs. Flynn's inchoate right of dower in the lands. But, on full consideration, I can see no reason why a court of equity, for the purpose of relieving either Mr. or Mrs. Flynn from an embarrassment which has resulted from their own conveyance, should now exercise its powers to restore them to the status which existed before the conveyance. The conveyance, as to Flynn's interest, was made against equity, and as to Mrs. Flynn's, was the method she chose for availing herself of a strictly legal right. Her omission to fully protect herself is not, under the circumstances, any basis for an appeal to equity to remedy the omission by restoring the status. This course should not be taken if the complainant's equity to a conveyance under the agreement can be at all worked out with the title in its present status in a manner that will give defendants all the equities they are entitled to under the conditions they have themselves created. This can be done by taking into account the fact that the Napuranos, by receiving this deed, have in fact discharged the encumbrance of the inchoate right of dower, an encumbrance which was prior to complainant's right. Having discharged it, they are entitled to be paid for this, just as they would be reimbursed if they had discharged taxes, or any other prior encumbrances. The amount to be paid cannot, however, be fixed by the terms of the agreement. The agreement does not contemplate any further payment to Mrs. Flynn for the dower right unless their deed is held good, and makes no express agreement for further payment if the deed be set aside. The agreement seems to be based on the theory that if the Saldutti contract was held valid against the purchasers, the deed of the latter would be set aside and no title at all would remain in the Napuranos. Therefore it did not provide in express terms for the real status which exists in equity, viz., that the deed is still valid for the purpose of conveying the legal title, but this title is held in trust for the equitable owners. The conveyance having failed to convey complete title to the lands, the purchasers are not bound under the agreement, as I construe it, at all events, and whether they get

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Flynn's title or not, to pay Mrs. Flynn \$500 for her dower right, but are only obliged to pay this \$500 to her as part of the whole consideration of \$5,100, and on getting the whole title. But inasmuch as payment to Mrs. Flynn for the conveyance of her interest was clearly contemplated, and the agreement did not provide for any contingency on which the purchasers should hold the estate without payment, she is entitled, I think, to recover compensation for her interest. The amount to be recovered will not, however, be the price fixed in the agreement, as the deed, so far as the purpose of the payments to her or to Flynn is concerned, has been set aside, and the right of recovery would be for the reasonable value of her interest. This might be recoverable at law on the common counts. *2 Ch. Pl. *39*. Complainant, therefore, as a condition for the conveyance by the Napuranos, free from this inchoate dower right conveyed or released to them, and for the value of which they are or may be liable, must pay this value, to be settled by the court. This amount must, however, be paid to Mrs. Flynn, as the Napuranos have not paid her for it, but on the condition that she release the Napuranos from any further claim to recovery under the agreement. If she declines to do this, the payment must be made to the Napuranos, leaving her to her remedy at law against them.

The next question is whether the complainant is entitled to compensation from Flynn for this payment. Complainant's counsel suggests indemnity by a retention of a portion of the fund in court, but as the inchoate right of dower is in fact gone, and the conveyance from the Napuranos would be free of any estate in dower, there is no estate or encumbrance to be indemnified against. By reason of this fact the case does not come within the application of the decisions relied on by counsel for Flynn as establishing the rule that on the refusal of the wife to join in the conveyance the husband cannot, on a bill for specific performance, be required to make compensation or give indemnity unless the wife's refusal has been at his instance or by collusion. This question arose in these cases only because the wife's interest was still outstanding at the time of the conveyance directed by the court, and the purchaser received

title subject to the wife's inchoate dower. Complainant has a right to compensation in this case, arising from the fact that, as Flynn has not the legal title, and does not make the conveyance, it will not be possible to decree that he make a conveyance of his title with warranty, as required by the contract, and thus give complainant a remedy at law. If Flynn still held the title, and the wife, without any collusion with him, had refused to join in the deed, the only conveyance the court could direct would be a conveyance with warranty, which would leave complainant to his remedy at law for breach of the covenant against encumbrances. Such conveyance would not give complainant the entire estate for which he contracted, but it would give all of the estate over which the court had control, and carry out the contract, so far as practicable. But as Flynn makes no conveyance, this remedy at law cannot be given or reserved, and the status on the entire case is that complainant, being obliged to make compensation to the Napuranos for the removal of an encumbrance which Flynn was bound to remove in order to carry out the contract, can have no reimbursement or recovery for this payment unless it be made in this suit, and by a deduction out of the purchase-money coming to Flynn. The court, under these circumstances, should do complete justice between the complainant and Flynn in this action, and to do this complainant must be allowed a deduction for the amount payable to the Napuranos or Mrs. Flynn. The Napuranos, having paid to Flynn \$200 on account of the purchase-money, are also entitled to receive that sum out of the purchase. This right is independent of the agreement for repayment. And Flynn, having received no more than this amount, is entitled to receive the balance upon the deed being made to the complainant by the Napuranos. At the hearing some question was raised as to complainant's assignment of part of his interest in the contract, and releases of these interests or consent to the conveyance to complainant should be given if required. This matter may be raised at the settlement of the decree, and also the matters of interest and accounts for rents.

2 Buch. Ramsey v. Perth Amboy Shipbuilding, &c., Co.

ALLEN L. RAMSEY

v.

PERTH AMBOY SHIPBUILDING AND ENGINEERING COMPANY.

[Decided December 15th, 1906.]

1. A written contract with the United States government, providing for payment "at such times and in such amounts as the officer in charge of the work might elect," cannot be varied by parol evidence that government officers stated, when attention was called to such provision just before signing, that payments could be expected every thirty days.

2. Where a contractor fails to fulfill his contract, it is the duty of the other party to make reasonable exertions to mitigate his loss.

3. Evidence of a claim for damages for breach of contract filed with a receiver considered, and *held* not to show that the claimant could have done anything to mitigate the loss.

4. The burden of proving that damages for breach of contract could have been mitigated rests on the party guilty of the breach.

5. The provision in a shipbuilding contract giving the party contracting for the ships power to complete the work in the event of failure by the other party is not compulsory.

On appeal from the determination of a receiver.

Mr. John B. Vreeland and *Mr. Harrison P. Lindabury*, for the United States of America.

Mr. Adrian Lyon and *Mr. Frank P. McDermott*, for the receiver.

STEVENS, V. C.

This is an appeal from the disallowance by the receiver of the shipbuilding company of a claim presented by the United States.

The claim is one for damages for breach of a contract by the shipbuilding company to construct two vessels for the price of \$105,000. After twenty per cent. of the work of construction had been done in the case of one of the vessels, and twelve and

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a half per cent. in the case of the other, the company failed. The government readvertised. The lowest bid for two similar boats was \$154,670, and these boats were built at that price. The damages demanded are the difference between this sum and the sum for which the shipbuilding company agreed to build.

The first contention is that the company was disabled from performing because the government did not make those payments on account to which it was entitled.

The contract provided for "payment to be made at such times and in such amounts as the officer in charge of the work might elect." The effort was to vary this contract by evidence to the effect that government officers stated, when attention was called to this clause, just before signing, that payments could be expected about every thirty days. No payments, in fact, were made. The statement, if proved, is obviously at variance with the terms of the writing, and for that reason inadmissible. *Naumberg v. Young*, 44 N. J. Law (15 Vr.) 331; *Hallenbeck v. Chapman*, 72 N. J. Law (43 Vr.) 202. It is none the less so because it is put in as evidence of custom.

It is secondly contended that the United States took too much time to approve the plans for portions of the work from time to time submitted, and so prevented the work from being done. These plans were prepared by the shipbuilding company as the work progressed and submitted to the quartermaster's department in New York. They were frequently returned with modifications and corrections. The company prepared new plans and blue-prints with these modifications and corrections embodied in them. They were again submitted to the quartermaster's department, and, if satisfactory to it, sent to the American Bureau of Shipping, for approval by that bureau, the specifications so providing. After examination by this latter body they were returned to the quartermaster's department, which returned them to the shipbuilding company. This took time. Mr. Master, the receiver's witness, said on his direct examination that the plans were very much delayed, but his cross-examination, taken in connection with the written correspondence and with the evidence of Mr. Scott, tends to show that the government acted with reasonable diligence.

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It is perfectly evident, on the testimony of Mr. Master himself, that the price at which it was agreed to build was too low, and that it would have been impossible for the company, with the force of men at its disposal, to have completed the vessels within the time specified.

I can find nothing in the evidence going to show that the failure to perform the contract was due to delay in the quartermaster's office.

The point upon which receiver's counsel principally relied was that it was the duty of the government to have mitigated the loss—to have taken the partially-constructed boats and completed them.

It is said in *Benj. Sales* (4th Am. ed.) ¶ 1327 that

"in every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss."

The supreme court of the United States (*Wicker v. Hoppock*, 73 U. S. 94, and *Warren v. Stoddart*, 105 U. S. 224) lays down the rule as follows: "Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquents with such damages only as with reasonable endeavors and expense he could not prevent."

The rule applies as well to cases of contract as to cases of tort (*Sedgw. Dam.* ¶ 205), and may be variously illustrated. If A breaks down B's fence, and B does not repair till months afterwards, in consequence of which cattle get in and destroy the next year's crop, B cannot sue for the loss of the crop, but only for the cost of repairing the fence. *Loker v. Damon*, 17 Pick. 284. If a servant be wrongfully discharged, it is incumbent upon him to seek other similar employment, and the amount earned, or that might, with reasonable effort, have been earned, will go in reduction of his damages. *Larkin v. Hecksher*, 51 N. J. Law (22 Vr.) 135. If A and B enter into a contract, by the terms of which A is to give B possession of certain machines, which B is to sell for A on commission, and these machines are

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taken out of B's possession by C, who also tenders to B the right to sell them in a way equally remunerative to himself, B cannot recover from A the amount of commissions so agreed upon. *Beymer v. McBride*, 37 Iowa 114. If a common carrier agrees to transport A's oats within a certain time and fails to do so, and the oats become mouldy in the hands of A's agent after that time, when he might have preserved them from injury by stirring, A cannot recover for the depreciation in the value of the oats, attributable to the failure to bestow necessary care. *Hamilton v. McPherson*, 28 N. Y. 72. If A agrees to make boilers for B, and after the work has been commenced, B notifies A that he rescinds the contract, it is A's duty, as soon as practicable, to stop the work. He cannot thereafter go on to the injury of B. *Dillon v. Anderson*, 43 N. Y. 231. In all these cases it was held that the plaintiff was bound "to mitigate the loss by acting as an ordinary man of business would have acted." The law, for wise reasons, to quote the words of Justice Seldon, in *Hamilton v. McPherson*, "imposes upon a party subjected to injury the active duty of making reasonable exertions to render the injury as light as possible."

But the rule requires such exertions only as are reasonable. This is illustrated by two cases in the supreme court—*The Baltimore*, 8 Wall. 377, and *The Falcon*, 19 Wall. 75. In the former case a schooner was sunk in a collision with the steamer Baltimore in water so shoal that the masts projected eighteen feet above the surface. It was found that the vessel could have been easily raised and repaired, and it was held that the owner could not recover damages as for a total loss. In the latter case the vessel sank in five fathoms of water, and it was found that she could not have been raised and repaired without a large expenditure of time and money. It was held that the steamer Falcon was liable for her full value. In the case of *The Havilah*, 50 Fed. Rep. 331, the court refused to allow as damages the cost of raising and repairing a sunken vessel so far as that cost exceeded the value of the boat at the time of the collision.

In the light of these adjudications, let us look at the facts of the present case. The two vessels were to cost \$105,000. The lowest bid which the government could obtain on readvertising

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was \$154,670. The receiver's witness, Master, says that the vessels which the shipbuilding company agreed to construct would, when completed, have been worth \$85,000 apiece, or \$170,000, and that the bid of \$154,670 was low. He says, moreover, that the amount of work done upon the two vessels at the time the company failed was fairly represented in money by the sum of \$40,000. It will thus be seen that even had the government been in a position to have gone on and completed these boats they would, in all probability, have cost not less than \$114,000, and the government would still have had a claim of \$9,000 against the receiver, while the receiver, who now has the incomplete vessels, would have had no further interest in them or claim respecting them. But it is not likely that the government could have finished the boats for \$114,000. The photographs show that they were far from being in a condition to be launched. Their bare ribs were not even, to any considerable extent, plated. It is not shown that the government had any facilities for taking up the work where it had been left off. It had at that point no tools, no machinery, no force of men, no organization. It is not shown by the receiver that any other yard would have undertaken the work of completion at a price that would have been advantageous to him. No one can read the evidence without coming to the conclusion that it would probably have cost the government considerably more than \$114,000 to have finished the vessels, or to have procured a contractor to finish them. The burden of proving that the damages sustained could have been mitigated rests upon the party guilty of the breach of contract. *Hamilton v. McPherson*, 28 N. Y. 72; *Howard v. Daly*, 61 N. Y. 362. The receiver has not shown affirmatively that effort and expenditure by the United States in the direction suggested by him would have resulted in any substantial benefit to the trust which he represents.

The suggestion that article 5 of the contract, which gives the United States power to complete the work, is compulsory, is completely met by *Bernz v. Marcus Sayre Co.*, 52 N. J. Eq. (7 Dick.) 275, lately decided by the court of errors and appeals.

Strickland v. National Salt Co.72 Eq.

CHAUNCEY H. STRICKLAND

v.

NATIONAL SALT COMPANY.

[Decided October 19th, 1906.]

1. A corporation, authorized to issue stock of the par value of \$250 in payment of property or corporate stock, must, to make lawful the issue of stock in consideration of acquiring the stock of another corporation, and to supply a sufficient consideration for a promise to pay an additional sum for such stock, make a *bona fide* appraisal of the actual cash value of the stock acquired at a sum not less than the par value of the stock issued, together with the additional sum agreed to be paid.

2. An intentional disregard of the statutory rule, involving an intentional overvaluation of property acquired by a corporation, is a form of fraud prohibited by the statute, and the issuing of stock without making any appraisal of the value of the thing purchased thereby is unlawful.

3. A domestic corporation was authorized to issue stock of the par value of \$250 in payment of property of that value, including shares of corporate stock. The corporation agreed to pay \$250 in its own stock for each share of a foreign corporation, and agreed to pay, in addition, \$106.25 in ten semi-annual installments.—*Held*, that if each share of stock of the foreign corporation was worth \$356.25, the semi-annual installments would be ordinary debts, the equivalent of which had gone into the treasury of the domestic corporation, and would not be dividends.

4. A domestic corporation agreed to pay \$250 in its own stock for each share it acquired of the stock of an Ohio corporation, and, in addition, it agreed to pay \$106.25 for each share. The domestic corporation brought suit in the courts of Ohio against the foreign corporation and a trust company, acting on behalf of the certificate-holders, to set aside the agreements.—*Held*, that a decree of the Ohio court canceling the agreements was binding on the trust company, and was *res judicata* in a proceeding by it to establish a claim against the domestic corporation for the amount which it had agreed to pay for the stock.

On appeal from the adjudication of the receivers disallowing the claim of the American Trust Company, Limited, amounting to \$725,156.40, with interest thereon.

Mr. Joseph H. Adams and Mr. Charles E. Hendrickson, Jr.,
for the appellants.

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Mr. Charles W. Fuller and Messrs. William B. Putney and Henry B. Twombly (of New York), for the receivers.

STEVENSON, V. C.

My conclusion is that the adjudication of the receivers should be affirmed.

1. The question might be raised whether there ever was any lawful consideration for the contract of the National Salt Company to make these cash payments to the certificate-holders on whose behalf the trust company presents its claim. The New Jersey company, the National Salt Company, bought the shares of stock of the United Salt Company, the Ohio corporation, from these certificate-holders, and undertook to pay the consideration partly by an issue of its own stock and partly with cash, which was agreed to be paid in installments during a period of five years. It is unnecessary to set forth the details of the transaction or exhibit the parts which the National Salt Company, the United Salt Company, the American Trust Company and the stockholders of the United Salt Company, who became certificate-holders, took therein. These details appear to be quite fully set forth in the report of the decision of the federal circuit court of appeals hereinafter cited.

For present purposes the fact to be kept in view is that the National Salt Company paid for the stock of the Ohio company which it bought, in part at least, by an original issue of its own stock. Under the certificate of incorporation of the National Salt Company and the laws of New Jersey, this company could lawfully issue stock of the par value of \$250 in payment for property of that value in cash, including shares of stock such as that of the United Salt Company. In this instance this company agreed to pay, and did pay, \$250 in its own stock for each share it acquired of the stock of the United Salt Company of the par value of \$100, and it also agreed to pay, and undertook to bind itself legally to pay, in addition, the sum of \$106.25. In order to make the issue of stock lawful and supply a sufficient consideration for the promise to pay the \$106.25, the directors of the National Salt Company must have made a *bona fide* appraisal of the actual cash value of the stock of the United

Salt Company at a sum not less than \$356.25 per share. Whether the appraisal would support the stock issue and the agreement to pay the \$106.25 if the value found was less than the above-mentioned sum (\$356.25) by the discount on the installments I do not stop to consider. The question of fact suggested is whether, applying the rule laid down by the court of errors and appeals in *Donald v. American Smelting Co.*, 62 N. J. Eq. (17 Dick.) 729, the inference must be drawn from the testimony in this case that the directors of the National Salt Company were guilty of fraud in this transaction. Intentional disregard of the statutory rule involving an intentional overvaluation of the property purchased, of course, is one form of the fraud prohibited by the statute. Issuing stock without any valuation at all—without making any appraisal or ascertainment of value of the thing bought—must, I think, likewise be condemned.

In this case there seems to be room to argue that, after placing the burden of proof upon the objectors to this claim, the evidence leads to the conclusion that there was no appraisal of the value of the stock of the United Salt Company at the sum of \$356.25 per share, or that sum less the discount on the deferred payments, or at \$250 in cash, or any other sum of money whatsoever. Of course, a valuation of the acquired property in stock of the purchasing company, or an agreement made in entire good faith providing an equitable basis for the exchange of stock, is not a compliance with the statutory rule. The directors of the purchasing company are bound to honestly determine the value of the property which they acquire in money. The value in money so ascertained is the measure of the amount of stock at par which may be issued therefor.

It may be argued that, for all that appears in this case, all the parties to this transaction went into it knowing well that each share of stock of the United Salt Company was fully paid for, or more than paid for, by the two and one-half shares of stock of the National Salt Company for which it was exchanged. The result might be that the agreement on the part of the National Salt Company to pay \$106.25, in addition to giving two and one-half shares of its stock, should be held to be without

2 Buch.**Strickland v. National Salt Co.**

consideration. See *Volney v. Nixon*, 68 N. J. Eq. (2 Robb.) 605 (1904).

Another view also might be that a full consideration should be accorded to the promise to pay the \$106.25 if the share of stock of the United Salt Company acquired was worth that much money, while any deficiency in the value of the acquired share to make up the total of \$356.25 would be collectible by a call on the two and one-half shares of stock of the National Salt Company.

I shall not consider any of the legal questions which arise in case the proposition of fact should be established that there was no *bona fide* appraisal of the stock of the United Salt Company at the value *in money* of \$356.25 per share, and that all the parties to this transaction were so informed. It is this fundamental proposition of fact which remains undetermined, so far as this case is concerned.

2. It is also unnecessary to discuss or determine the question whether the agreement to pay the \$106.25 in cash in ten semi-annual installments through a period of five years was in fact an attempt to guarantee the payment of dividends for that period of time upon the new stock issued by the National Salt Company. In an action brought by a certificate-holder against the company the United States circuit court of appeals, second circuit, decided this question upon the evidence then before the court adversely to the certificate-holder. *National Salt Co. v. Ingraham*, 122 Fed. Rep. 40 (1903). The same court, when the same case was brought before it again, held that its prior decision was erroneous, and ruled the other way. *Ingraham v. National Salt Co.*, 130 Fed. Rep. 676 (1904).

If the evidence shows, as a matter of fact, that each share of stock of the United Salt Company was worth \$356.25, then the semi-annual installments would not be dividends paid out of the profits, but would be ordinary debts, the equivalent of which had gone into the treasury of the company, and thus constituted the fund, or the origin of the fund, from which such debts may be paid. If for every \$106.25 which the National Salt Company agreed to pay out it had received an exact equivalent, or an equivalent less the discount on the installments, there are cer-

tainly strong grounds for arguing that the engagement is not a contract to guarantee dividends. On the other hand, if the directors of the National Salt Company in good faith appraised each share of stock of the United Salt Company at \$356.25, it certainly is a singular coincidence that such value exactly sustained the new issue of stock and exactly supplied the equivalent of the guaranteed dividends which, according to the terms of the original deal, the stockholders of the United Salt Company were to have. Of course, the transaction is not to be condemned as unlawful because it accomplished the same object which might be accomplished, or formerly was attempted to be accomplished, by an unlawful means. *Pierce v. Old Dominion, &c., Co.*, 67 N. J. Eq. (1 Robb.) 399; see pp. 422, 423. This whole question whether the agreement under consideration was an agreement to pay for property or an agreement to guarantee dividends is purely one of fact, and I think is essentially connected with the question of fact above referred to relating to the *bona fide* valuation of the stock of the United Salt Company.

3. I have left the questions of fact and of law above indicated undecided because it seems to me beyond all question that the appellant, the American Trust Company, and its successors are bound by the decree of the Ohio court, which has been put in evidence in this case. In an action in the court of common pleas in Cuyahoga county, Ohio, which went to a decree after this appeal was taken, all the agreements upon which the appellant's claim is based were declared void and set aside. The National Salt Company was the complainant in this action, and the United Salt Company and this appellant, the American Trust Company, and large numbers of the certificate-holders were defendants. The decree provided for the cancellation of all the agreements which the parties had made and the exchanging back of the certificates of stock of the two salt companies. It is not suggested that this decree has even been appealed from by anybody. It stands in full force to-day, and no way has been suggested by which its force and effect as a bar to the appellant's claim can be evaded. The decision of the receivers in disallowing the appellant's claim will therefore be affirmed, upon the ground that the invalidity of the claim is *res adjudicata*.

2 *Buch.* New Jersey Bldg. Loan and Inv. Co. v. Schatzkin.

Whether any of the certificate-holders not parties to the suit in the Ohio court have valid claims which they are severally entitled to prove as debts before these receivers is a question which is not presented for consideration. It is the claim of the American Trust Company, acting on behalf of all the certificate-holders under the instruments which have been set aside as illegal and void, that the receivers have properly disallowed. See *National Salt Co. v. Ingraham*, 143 *Fed. Rep.* 805 (1906).

THE NEW JERSEY BUILDING LOAN AND INVESTMENT COMPANY

v.

SOLOMON N. SCHATZKIN et al.

[Decided November 10th, 1906.]

1. A tenant by the curtesy by virtue of title acquired by his deceased wife through conveyances from a mortgagor does not claim an interest in the premises through any conveyance which may be recorded within the Chancery act, section 58, as amended by *P. L. 1903 p. 385*, providing that in a suit to foreclose a mortgage all persons claiming an interest in the premises through a conveyance which may be recorded, and which shall not be so recorded, shall be bound by the proceedings in the suit in the same manner as if they had been made parties thereto, and the mortgagee, on purchasing the premises at the foreclosure sale, is not entitled to a writ of assistance for the summary dispossession of the tenant.

2. A mortgagor conveyed premises to a grantee, who conveyed to a third person, who conveyed to a married woman. At the time the mortgagee filed his bill to foreclose, the married woman was in possession and her deed recorded, but the deed to the third person was not recorded. The mortgagee only made the mortgagor and his grantee and their wives parties.—*Held*, that the husband of the married woman, who after her death claimed the premises as tenant by the curtesy, did not claim the estate under the mortgagor or his grantee, and he was not bound by the decree of foreclosure.

3. A mortgagee purchasing the premises at a foreclosure sale stood by for over two years after the purchase without exhibiting his title to a person in possession under a deed recorded at the time of the filing of the

New Jersey Bldg. Loan and Inv. Co. v. Schatzkin.72 Eq.

bill to foreclose, or her surviving husband. They were in possession without notice of the purchaser's title.—*Held*, that the purchaser was barred by laches from obtaining the aid of a court through a writ of assistance for the removal of the husband claiming the premises as tenant by the curtesy.

On proceedings for order for possession and writ of assistance. Motion for order heard on verified petition of purchaser and verified answer of party in possession.

Mr. John Howard Porter, for the petitioner.

Mr. H. Westbrook Winfield, for the respondent Michael Tresanti.

STEVENSON, V. C.

The petitioner, who was the complainant in the suit, became the purchaser of the mortgaged premises at the foreclosure sale, and received a deed of conveyance from the sheriff dated March 25th, 1904. The only defendants were the original owner and mortgagor, Schatzkin, and his grantee, Hillquitt, and their respective wives. The bill alleges the conveyance of the mortgaged premises to Hillquitt, and also alleges that Hillquitt "now claims to own the same."

As a matter of fact, when the bill was filed July 7th, 1903, one Carmela Tresanti, now deceased, wife of Michael Tresanti, the defendant in these proceedings for possession, was in possession of the mortgaged premises, holding under a warranty deed made to her by the Passaic and Garfield Real Estate Company, bearing date June 6th, 1901, and duly recorded. Although the defendant Morris Hillquitt had conveyed the premises to the Passaic and Garfield Real Estate Company, the deed of conveyance had not been recorded at the time of the filing of the bill, and hence the searcher who examined the records for the purpose of the foreclosure suit presumably reported that the title stood in the name of Hillquitt.

The complainant, however, had full notice of some claim to or interest in the mortgaged premises on the part of Michael Tresanti, or of his wife, the said Carmela, on account of their

2 Buch. New Jersey Bldg. Loan and Inv. Co. v. Schatzkin.

occupancy of the same. The petition sets forth that at the time of the filing of the bill Michael Tresanti

"was in possession of the said premises by virtue of a lease or other agreement between him, the said Tresanti, and the said Solomon N. Schatzkin, one of the defendants in the above cause, your petitioner being led to so believe from the fact that payments of interest on the mortgage * * * were made to your petitioner or to its agent by the said Tresanti."

It seems plain that a very little inquiry on the part of the complainant would have disclosed the fact that this Italian family were in possession of the mortgaged premises under a deed to the wife, which had been on record for over two years.

Carmela Tresanti died intestate on March 27th, 1905, leaving her surviving her husband and four minor children. The husband remained in possession of the premises, and although it appears that he supplied the consideration for the conveyance to his wife, a very substantial sum, the inference is that his only interest in the premises is that of tenant by the curtesy. As between himself and his children, he appears beyond all question to be entitled to possession.

The demand for possession was made on June 22d, 1906, two years and three months after the complainant took title from the sheriff, and one year and three months after the life estate of Michael Tresanti commenced. The defendant does not show that either Carmela Tresanti or Michael Tresanti ever had any notice of the foreclosure suit or of the sheriff's conveyance to the complainant until June 22d, 1906, when the demand for possession was made.

1. This is not a case, in my opinion, to which the fifty-eighth section of the Chancery act, as amended, can be applied. *P. L. 1903 p. 385*. Michael Tresanti does not claim "an interest in or encumbrance or lien upon" the mortgaged premises "by or through any conveyance," mortgage, assignment, lien, or any instrument which by any provision of law could be recorded. He claims under no instrument of any kind. His wife Carmela did claim under an instrument which not only could have been recorded, but which in fact was recorded. But if by any construction of this statute Carmela Tresanti would now, if alive,

be liable to summary dispossession by a writ of assistance, I think a further and unwarrantable extension of the statute would be necessary in order to make it affect the estate of Michael Tresanti as tenant by the curtesy.

2. The recent decision of the court of errors and appeals in the case of *Strong v. Smith*, 68 N. J. Eq. (2 Robb.) 703 (1905), is cited to sustain the application of the petitioner in this case. It is insisted that that case establishes the doctrine that if it is clearly shown that the party in possession "claims under one who was a party to the suit, and that his legal right of possession is undoubtedly subordinate to the right for the enforcement of which the writ of assistance is prayed," then the complainant may refrain from making such party in possession a party to his foreclosure suit, leave him without notice of any kind that the suit is pending, then purchase the premises at the sheriff's sale, and last of all oust the party in possession by a writ of assistance, leaving him to his remedy by a bill to redeem.

If it is the decree which is enforced in such case, it seems to be enforced, not by compelling the party in possession, whose estate and right of possession have been conveyed under the decree, to submit to such conveyance, but by compelling such party to give way to the superior legal right of possession which the purchaser holds under the mortgage deed. Whether what is thus done, strictly speaking, is the enforcement of the decree and sheriff's deed, or the enforcement of the original mortgage deed, is a question which we need not consider if the same has not been finally answered by this decision of our court of last resort.

It must at all times be kept in mind that no right of trial by jury is involved in the class of cases to which the principles enunciated in *Strong v. Smith* are to be applied if courts of equity as well as courts of law may adjudicate in regard to a legal title that there is no question which the party defendant has a right to have submitted to a jury. If the purchasers in these cases were remanded to a court of law they would obtain judgment by order of the court. The decision in *Strong v. Smith* permits the court of chancery to exercise the summary powers of a court of law in favor of a purchaser at a sale held

2 Buch. **New Jersey Bldg. Loan and Inv. Co. v. Schatzkin.**

under its decree where the legal right of such purchaser to possession of the land which has been sold, as against the party holding possession, cannot be questioned and could not be questioned in an action of ejectment.

I do not think that it is necessary, for the purposes of this case, to discuss at length or in detail the authoritative exposition of the nature and functions of a writ of assistance contained in the opinion of the court of errors and appeals delivered through Mr. Justice Dixon in this case of *Strong v. Smith*. Of course, all such general deliverances are to be construed with reference to the exact facts of the case which is decided. Whether, for instance, the rule formulated by Mr. Justice Dixon applies to a grantee of the whole fee from the mortgagor or later owner of the equity of redemption, or only to tenants who hold under such mortgagor or later owner, perhaps is a serious question which will yet come up for consideration. I cannot find that Michael Tresanti, this tenant by the curtesy in this case, can in any sense be held to claim his estate "under" the original owner, the mortgagor, Schatzkin, or his grantee, Hillquitt, who, with their respective wives, were the defendants in this suit, within the meaning of Mr. Justice Dixon's statement.

3. I think that the laches of the petitioner bars its claim to the summary aid of this court through a writ of assistance. This purchaser stood by for two years and three months without even exhibiting its title to Carmela or Michael Tresanti, who were in possession without notice of such title. During this period the title passed from the party, Carmela, who held it at the time of the sheriff's sale, and an entirely new interest in the mortgaged premises came into existence.

How long will a court of equity permit a purchaser to wait and hold his sheriff's deed in concealment from parties from whom the existence of the foreclosure suit has been also concealed, while the mortgaged premises pass, by a series of conveyances, through a series of owners? The writ of assistance is provided in order to enable a court of equity to enforce the rights of purchasers at sales held under its decrees. It is not an equitable substitute for the action of ejectment at law for general use to put parties in possession of real estate which they are

entitled to possess. I can see no reason why this equitable writ should stand as a substitute for an action of ejectment at law for an indefinite period after the decree, during which period the party claiming possession under the decree has elected to leave his rights unenforced.

It is no answer, in my opinion, to this objection of laches to point out that in the class of cases under consideration the right of the party in possession "is undoubtedly subordinate to the right for the enforcement of which the writ of assistance is prayed." We are dealing with what is equitable, not with what can be accomplished under the oftentimes harsh rules of the common law. Our laws favor the collection of a mortgage debt by the most advantageous possible sale of the mortgaged premises, and discourage the action at law on the bond and the ancient remedy in equity of strict foreclosure. It is the duty of the complainant to make all persons who hold titles to or interests in the mortgaged premises, which are subject to his mortgage, parties to the foreclosure suit in order that the most advantageous sale possible may be had. If there had been a second mortgagee made a defendant to this foreclosure suit, he would have had the power to compel the complainant to bring in the owner of the equity. The complainant appears in this case to have ignored the plainest notice that these Italians were in possession under some kind of a title. The petition alleges that the petitioner inferred that Michael Tresanti was in possession "by virtue of a lease or other agreement," and yet apparently made no inquiry to find out what this lease or agreement was. If it be the necessary result of the decision of the court of errors and appeals in *Strong v. Smith* that the petitioner now before this court had a right to be put in possession of the mortgaged premises by a writ of assistance issued against the owner of the equity of redemption in possession of the premises, whose estate he, the petitioner, had refrained from selling, it seems to me that the equitable right which is thus accorded to the petitioner should be prosecuted with diligence, and that delay for over two years, during which a change of title has taken place, may well be held to be a waiver.

The motion for the order for possession will be denied.

2 Buch.

Booth & Brother v. Burgess.

ALFRED W. BOOTH & BROTHER

v.

JOHN R. BURGESS et al.

[Decided November 22d, 1906.]

1. A manufacturer of building materials declared for the open shop, and its employes, who were union men, struck. The labor organizations embracing the building trade, through their officers, notified the boss carpenters that the manufacturer's goods were unfair, and that members of the unions would not handle them, and if a boss carpenter received them his employes would be called out. Some of the boss carpenters broke their contracts with the manufacturer, and others, who had been its regular customers, refrained from using its goods. The scheme of the officers of the unions included coercion of the employes of the boss carpenters to strike against their will.—*Held*, that the manufacturer was entitled to an injunction restraining the officers of the unions from directing or inducing by threats, &c., the employes of the boss carpenters to strike.

2. Where a third person intentionally, by the use of any kind of means, causes a breach of contract involving damage, he is *prima facie* guilty of a tort.

3. Every dealer is entitled to a free market, and to enjoy the right he must have all other dealers with him left free to deal or not, as they may voluntarily elect, and a violation of the right consists in coercing the market.

4. It is the absolute right of all men to contract or refrain from contracting, and the motives which actuate a man in refraining from making a contract in relation to labor or merchandise, or anything else, are beyond inquiry.

5. Men have an absolute right to act in voluntary combination in respect to contracting or refraining from contracting, however immoral their motives may be.

6. A manufacturer of building materials declared for an open shop, and its employes struck. The labor organizations embracing the building trades, through their officers, notified the boss carpenters that the manufacturer's goods were unfair, and that the members of the unions would not handle them. The scheme of the officers of the unions included the coercion of the employes of the boss carpenters to quit work in case materials were purchased from the manufacturer. The coercion, if exercised, would be exercised in accordance with the regulations of the unions.—*Held*, that the officers of the unions were not justified in interfering with the manufacturer's market by coercion exercised on the employes of the boss carpenters.

Booth & Brother v. Burgess.72 Eq.

On motion for a preliminary injunction. Heard on bill with annexed affidavits and answer with annexed affidavits.

Mr. Charles E. Hendrickson, Jr., and Mr. Charles L. Corbin,
for the motion.

Mr. John J. Mulvaney, contra.

STEVENSON, V. C.

Upon the motion papers as they stand, counsel for the complainant applied for an injunction merely to enjoin the maintenance of a boycott. The motion for a wider preliminary injunction indicated by the order to show cause was abandoned.

The complainant is a corporation under the laws of New Jersey carrying on the business of lumber dealers and manufacturers of doors, blinds, trim and other mill work used in the erection of buildings. Its customers are boss carpenters and building contractors. It owns its yard and mill, which are situate at Bayonne, in Hudson county, and the value of its plant and stock on hand is over \$200,000. It employs about twenty-five hands.

The defendants against whom a preliminary injunction was prayed for are officers and agents of the labor organizations which embrace the building trades of Hudson county. These trades are organized in the usual way, in local unions, a district council composed of delegates from all the local unions in Hudson county, and a united brotherhood composed of all the local unions throughout the United States and Canada belonging to the order, which local unions, however, are represented in the convention or governing body of the united brotherhood by delegates.

Consequent upon a dispute as to hours of labor and wages between the complainant and its employes, the complainant "declared the open shop," the employes struck, and thereupon the complainant became involved in a contest with the whole system of labor unions in Hudson county connected with the building trades, embracing between two and three thousand workmen. The complainant became "unfair," and all its products likewise

*2 Buch.**Booth & Brother v. Burgess.*

became "unfair." The labor organizations, through the defendants, their officers and agents, have notified the boss carpenters and builders that the complainant's goods are "unfair," and that members of the unions will not handle them, and that if they receive or use any of this unfair material their employees will be called out, and thus they are confronted with loss, if not ruin, in case they persist in dealing with the complainant. Under this coercion certain boss carpenters have broken their contracts with the complainant, under which they were receiving the complainant's goods, and, what is of more consequence, other boss carpenters and builders, who had been regular customers of the complainant, have been constrained to refrain from using its goods on their jobs, inasmuch as the inevitable result of such use would be that all their employees who are members of these allied labor unions would immediately be called off and forced into a strike.

It is a fact of the utmost importance, in my judgment, in this case—a fact which I think is absolutely essential to the granting of the most important part of the injunctive relief prayed for by the complainant—that the defendants' scheme for coercing the boss carpenters to conduct their business as they (the defendants) wish to have it conducted does not involve merely the voluntary action of the employees of the boss carpenters, individually or in combination, and the announcement of such voluntary action or intended voluntary action. The scheme includes the *coercion* by the defendants of the employees of the boss carpenters. These workmen are to be forced to strike against their will whenever the defendants shall say the word. The coercion consists in the fact that if any workman refuses to strike he is liable to a fine, and also to expulsion from his union. Expulsion from the union subjects the victim not only to obloquy, but also to pecuniary loss, and makes it more difficult for him to get employment and make his living, as is amply illustrated in this case.

It does not appear that the boss carpenters are greatly injured or inconvenienced by being obliged to refrain from dealing with the complainant. It may be inferred that these contractors are able to supply themselves with goods of the class which the com-

plainant manufactures from other sources, and hence they seem to be inclined readily to submit to the coercion of the defendants. Their attitude is precisely the same as that of Mr. Munce in *Quinn v. Leathem, infra*.

The pecuniary loss from this boycott falls directly upon the complainant, and it is evident that this loss is of such an extent and nature as will warrant the use of the injunctive power of a court of equity, provided such loss is caused by conduct of the defendants which is unlawful.

Upon the filing of the bill and annexed affidavits an order was made requiring the defendants to show cause why an injunction should not issue according to the prayer of the bill, upon the return of which order the defendants appeared and filed an answer and affidavits. After hearing an elaborate argument by counsel, I advised an order for an injunction restraining the defendants

"from calling out or directing to strike any employe or employes of the complainant's customers, or persons who were willing to deal with the complainant, with the intent or with the effect to coerce or induce by fear of loss such customer, or persons willing to deal with the complainant, to break their contracts with the complainant, or to refrain from dealing with the complainant; and also restraining the defendants from coercing or inducing such employes by fine or expulsion from a labor union, or by threat of such fine or expulsion, to refrain from being employed by such customers with the intent or effect aforesaid."

An appeal having been taken from this order to the court of errors and appeals, it is necessary that I should set forth the "reasons" of the order.

1. The order, I think, is sustained by authorities which are controlling in this court until the court of errors and appeals has been heard from. While a number of injunctions against boycotts have been issued from this court, and opinions in these cases have been published, no boycott case has as yet been decided by our court of last resort. That the injunction issued in this case is sustained by the prior decisions of this court, and by a great weight of authority in other states and in England, will appear, I think, beyond question from an examination of the following cases:

2 Buch.Booth & Brother v. Burgess.

Barr v. Essex Trade Council, 53 N. J. Eq. (8 Dick.) 101 (1894); *Martin v. McFall*, 65 N. J. Eq. (20 Dick.) 91 (1903); *Jersey City v. Cassidy*, 63 N. J. Eq. (18 Dick.) 759 (1902); *Sherry v. Perkins*, 147 Mass. 212 (1888); *Plant v. Woods*, 176 Mass. 492 (1900); *Moran v. Dumphy*, 177 Mass. 485 (1901); *Berry v. Donovan*, 188 Mass. 353 (1905); *My Maryland Lodge v. Adt*, 59 Atl. Rep. 721 (1905); *Boutwell v. Marr*, 71 Vt. 1 (1899); *Curran v. Galen*, 152 N. Y. 33 (1897); *Temperton v. Russell*, L. R. 1 Q. B. 715 (1898); *Quinn v. Leathem*, A. C. 495 (1901); *Giblan v. National Amalgamated Union*, 2 K. B. 600 (1903); *Glamorgan Coal Co. v. South Wales Miners' Federation*, 2 K. B. 545 (1903).

2. I might safely rest upon the controlling authority of the cases above cited without attempting any discussion of the principles which they announce, and which they are supposed to illustrate, if it were not for the fact that courts and judges in these cases, even when agreeing in results, often differ widely in their reasons.

Under the circumstances I shall endeavor, as briefly as possible, to set forth the legal propositions which seem to me to be sound and adequate to sustain the order which was made in this case. Many of the views herein set forth may perhaps be found to be erroneous by our court of last resort, and yet the order appealed from may be affirmed upon some of the principles promulgated in some of the above-cited cases, which principles I have rejected or found unnecessary to be considered.

Of course, it has been argued that the law of this case is in doubt, and hence no injunction should go. I do not think that this rule of procedure can be applied to thwart the complainant in its effort to have its whole case investigated and decided by the courts of this state in the most convenient and inexpensive manner. The authorities which now bind this court agree, I think, that the complainant is entitled to an injunction in the terms of the order. That is the law of the case—the settled law of the case—according to the prior decisions of this court, which, in the absence of any deliverance by the court of errors and appeals, must be deemed controlling. The fact that the reasons and reasonings and principles announced in the New Jersey

cases, or the American cases, or the English cases, or in all these cases, are variant, inconsistent, or even contradictory, and are still subject to free discussion and criticism, does not affect the fact that it is the settled law of New Jersey, entirely free from doubt at the present time, so far as this court is concerned, that the complainant in this case has a primary legal right, whatever the definition of that right may be, which the defendants have violated, and that the injunction which has issued from this court is the complainant's appropriate remedy.

3. A large part of the confusion and conflict among the boycott and strike decisions in this country and in England has arisen, I think, from the attempt which judges have made to define the delict, the tort, of the defendant in this class of cases without first analyzing the case so as to discover the right of the plaintiff or the correlative duty of the defendant, the invasion of which right and the violation of which duty constitute the tort to be defined. It is true that the law of torts has been developed in precisely this way. Sir Frederick Pollock remarks that "law begins not with authentic general principles, but with enumeration of particular remedies." *Poll. Torts* 16 ch. 11. Judges and text-writers, in elaborating the law of negligence, have at different times undertaken a definition of the tort of the defendant with which they were dealing without apparently bestowing the slightest regard to the underlying right of the plaintiff or its correlative duty resting upon the defendant, the existence of which, of necessity, was assumed. Some of these definitions have very little if any value, and some of them are false and misleading. Plainly there can be no tort committed by a defendant unless some right of the plaintiff has been thereby invaded. In the case of *Heaven v. Pender*, *L. R. 11 Q. B. Div. 507* (1883), Lord Escher (then Master of the Rolls Brett) illuminated the whole law of negligence by an analytical discussion, in which the primary right of the plaintiff or the correlative duty of the defendant in a negligence case is disclosed and formulated.

If the great English judges who delivered these exceedingly instructive and learned opinions in *Allen v. Flood*, *A. C. 1* (1898), had devoted more time to the ascertainment of the legal

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right, or the alleged legal right, asserted by the plaintiff, the violation of which constituted the tort charged against the defendant, I incline to think that they would have had less difficulty in ascertaining whether or not any tort had been committed, and, if so, what was the definition of such tort. The effort of a large number of learned judges to define a tort without agreeing upon the primary legal right which the tort postulates, especially when such effort is made with the use of such terms as "malice" and "maliciously," naturally leads to variant and conflicting opinions. While I shall not undertake at present to criticise the procedure of the English courts in this remarkable case, the history of the case from court to court perhaps presents the best illustration of the point which I am endeavoring to make, viz., that when a novel tort is recognized, and a remedy therefor is provided by the action of the courts, and such tort does not seem to belong to one of the ancient classes, which are labeled, and to which certain definite remedies are assigned, such as fraud, trespass or nuisance, it may be suspected that a novel right and its correlative duty have been consciously or unconsciously asserted, and that therefore the first thing to do is to discover and define that right and that duty. A definition of the right involves a definition of the duty, and *vice versa*, and oftentimes whether the one or the other shall be defined is a mere matter of convenience. See *Heaven v. Pender*, *supra*.

4. The primary legal right which it seems to me should be recognized as belonging to the complainant in this case may be defined or described as the *right to a free market*. In the case of *Jersey City Printing Co. v. Cassidy*, *supra*, in which a purchaser of labor in the market was interfered with and injured by conduct of the defendants, which coerced sellers of labor to refrain from dealing with him, the complainant, as they otherwise would have done, I endeavored to define the same right which it seems to me is presented in this present case. My opinion in that case, though hurriedly formulated, was the result of a very careful examination and consideration of the authorities, and I now refer to it without undertaking to repeat or restate at length the matters therein contained.

For the purposes of this present inquiry I think there are three rights, the violation of each of which is a distinct tort, which must be fully recognized and carefully distinguished.

First. We have the right in a contract. Our law now recognizes a contract right as property which is to be protected against undue interference by persons not parties to the contract. When a third party intentionally, by the use of any kind of means, causes a breach of the contract involving damage, he is *prima facie* guilty of a tort. The right, however, is not absolute. Circumstances may exist which cause the right to cease to exist. These circumstances are said to amount to a justification or excuse on the part of the person who has caused the breach of contract. There may be no harm in calling these exceptional facts a justification, and the use of such phraseology is certainly sustained by abundant analogies. When these definitions of rights are laid down what, in fact, is done is to describe what is *prima facie* a right, leaving for each case the question whether some further fact or facts not included in the definition do or do not take the case out of the scope of the definition. There is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed. Such exceptional fact makes the case an exception to the definition of the tort.

Second. We have the right to contract or to refrain from contracting. No man can exercise the right to contract except when he finds another man who in the exercise of his similar right is willing to contract with him. Whether an individual can commit a tort by violating the right to contract belonging to another we need not consider. The common instance of the violation or attempted violation of this right is where the state intervenes and undertakes arbitrarily to penalize the exercise of this right in certain particular cases.

Third. We have the right to a free market which is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect. Thus recognition is accorded to the "interest which one man has in the freedom of another." *Jersey City Printing Co. v. Cassidy, supra, 765.*

The tort exhibited by the violation of the right to a free market consists in coercing the market, *i. e.*, interfering with the right of a particular dealer to enjoy the advantages of *freedom* to deal with him on the part of all who may voluntarily desire to deal with him.

As in the case of the first right above mentioned—the right to enjoy the fruits of a contract as property—so also in this instance exceptional circumstances may make the right to cease to exist, and for convenience and in accordance with the analogies of the law such exceptional circumstances may be deemed as constituting a justification or excuse.

A fourth right, or a wide extension of the right above defined as the right to a free market, has undoubtedly been involved in if not expressly recognized by the decisions of some courts in strike and boycott cases. This wider right concedes to every man not only a *free* market but a market where transactions occur naturally according to the ordinary laws of trade and commerce, unaffected, not only by coercion, but also by persuasions or non-coercive inducements *from outside parties* applied by them with intent and with the effect to interfere with his dealings and thereby to cause him damage. Whether in New Jersey, upon a further development of the law, such a wider right will be recognized and the tort which consists in its violation will be restrained by injunctions, need not be considered in this case. No such injunction is asked for in this cause because the sole grievance of the complainant against the defendants is that they are practicing coercion in the market which is not only powerful but almost irresistible.

In many of the reported cases, including *Allen v. Flood* and *Quinn v. Leathem*, the tort which is generally described as “maliciously inducing” the dealer in the market to break his contract with the plaintiff to the plaintiff’s damage, is discussed concurrently with the very different delict which is described as “maliciously inducing” a dealer in the market to refrain from contracting with the plaintiff to the plaintiff’s damage. In the one case we have violation of the ordinary right in a contract which is a form of the right to the possession and enjoyment of property, and in the other, where the inducement is

coercive, we have a violation of the right to a free market. Without discussing the imperfect or vague description of these delicts arising from the use of that misleading word "maliciously," I desire now to point out merely that the effort to discuss at the same time two such different things would seem inevitably to lead to error and confusion. In the case now before this court we have presented both the right in a contract and the right to a free market, and the torts which consist respectively in the violation of those rights. But there is no suggestion made on the part of the complainant that its right to the enjoyment of its contracts has been violated by the defendants in any other way than by coercion. No case of "malicious" persuasions or "malicious" non-coercive inducements *causing* the breach of a contract, is suggested in the complainant's bill. It was not necessary in the order for the injunction to frame a separate prohibition with reference to the threatened breach of existing contracts as might have been the case if the bill had alleged that the defendants were violating the complainant's property-rights in contracts by *causing*, otherwise than by coercion, the parties to those contracts to break them.

5. We now approach the discussion of the facts of the case in hand, and in such discussion we must bear in mind at every stage two principles which, I think, at the present day, are established beyond question.

The first of these principles is the absolute right of all men to contract or refrain from contracting, which is one of the rights hereinbefore enumerated. The motives which actuate a man in refraining from making a contract in relation to labor or merchandise or anything else are absolutely beyond all inquiry or challenge. Self-evident as it may be, the proposition, I think, has often been lost sight of that the right to refrain from contracting is an absolute right, which every man can exercise justly or unjustly, for a good purpose or for a bad purpose, "maliciously" in the popular sense of the term, or benevolently.

The second principle to keep in view is not at present universally recognized as sound law, viz., that men have an absolute right to act in voluntary combination with respect to contracting or refraining from contracting. No doubt there is

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authority for the proposition that defendants, by combining with a "malicious" intent to exercise together the right to refrain from contracting, may be guilty of a tort—of a violation of a right held by the party damaged by such combined abstention from contracting. Passing the defect in the formulation of this proposition, I can only repeat what I attempted to set forth in deciding the case of *Jersey City v. Cassidy*, that it seems to me that the settled American doctrine, apart from all recent statutes, is that all dealers in the market, whether in merchandise or in labor, on each side of the market, have an absolute right to combine voluntarily to concurrently exercise their several rights to refrain from contracting if they see fit to do so, however immoral their motives may be. If this is not good law, then the right to refrain from contracting is subject to a most extraordinary limitation which leads to absurd results. It may be worth while to note precisely what a free combination of employers or employees or vendors or purchasers actually do when, for the purposes of a strike or a boycott, they concurrently exercise by agreement their several and respective rights to refrain from contracting. They are not combining, as is sometimes erroneously supposed, to do anything, much less to do the same thing; they are merely agreeing voluntarily that each of them will *refrain* from doing a certain thing which is precisely similar to another thing which each of the others in like manner will refrain from doing. If they commit any tort, i. e., any actionable wrong, it consists essentially in nonfeasance, not misfeasance—refraining from doing anything, not doing anything. Let us suppose that it is established as law that the combined *action* of a large number of persons may be so productive of evil as to make these persons civilly liable for a tort, which may be defined as a "malicious" or unjustifiable conspiracy to injure one in his business, even though precisely the same harmful conduct pursued to the extent possible by a single individual would not involve him in any liability whatever. This, it seems to me, is substantially the proposition which the judges or the most of the judges in *Quinn v. Leathem* considered as underlying one of the causes of action established in that case. The five officers and agents of the labor union were

found guilty of conspiring to instruct, *i. e.*, to positively direct the employes of Mr. Munce to refrain from dealing with him. This was held to be a misfeasance. The five defendants were not charged with combining to refrain from acting or to refrain from doing anything. When, however, we pass to a voluntary combination of Mr. Munce's employes to refrain from renewing their contracts for service with him, we have a clear case of nonfeasance. It seems to me that there is a very wide distinction between an unlawful conspiracy to do things which each one of the conspirators by himself has an absolute right to do on the one hand, and an unlawful conspiracy merely to refrain from doing things which no one of the conspirators is under the slightest obligation to do. The moment it is established that one man has an absolute right to refrain from contracting, and that his motives are beyond all challenge, I am entirely unable to perceive how a voluntary agreement between two men that they will severally and at the same time exercise this absolute right, can be erected into a tort involving liability for damages. Without for a moment conceding that either of the so-called conspiracies above contrasted can constitute a tort, I desire to point out that even if the first-mentioned conspiracy is held to be a tort in accordance with the views of the judges in *Quinn v. Leathem*, a great extension of the doctrine is necessary before the other conspiracy, the conspiracy of nonfeasance, the conspiracy to refrain from doing, can be adjudged such tort. If dealers in the market who voluntarily combine to refrain from contracting with intent to damage some one in his business are guilty of a tort, it must be that some or all of them are under an obligation to contract. It seems hardly possible that two or more persons may be liable for damages resulting from their failure to act unless they were legally bound to act. It did not require the judgment of the house of lords in *Allen v. Flood* to make clear the rule that when men, either singly or in combination, intentionally pursue a line of conduct which they have a right to pursue, the existence of an immoral or a "malicious" motive cannot make such conduct unlawful.

But I do not think that it is worth while in this country to waste time at the present day, and especially in view of the

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statutes which have very generally been enacted, in vindicating the absolute right of every dealer in the market to refrain from contracting, and to so refrain by voluntary agreement concurrently with similar abstention from contracting on the part of a thousand or ten thousand other dealers in the market. Hence it follows that a free boycott which causes enormous financial loss to its victim may be entirely without remedy either in a court of equity or a court of law. Whatever views may be entertained on this subject, it seems plain that there can be no practicable remedy in equity for such a voluntary boycott. No mandatory injunction will issue to compel men to deal who are refraining from dealing. An injunction to compel a number of men to buy goods or to go to work would be contrary to a well-settled rule, and would be a juridical curiosity. An injunction prohibiting a number of men from "conspiring" to refrain from dealing, when each of these men is absolutely free to so refrain, would also, it seems to me, be not only an anomalous and abortive procedure, but a dangerous attempt to interfere with conduct which is, and ought to be, beyond legal control—conduct which the law leaves subject to social and ethical influences only. Communities where men are guided in their dealings in the market by unscientific, impolitic or immoral principles are bound to suffer as compared with communities where correct and liberal principles are recognized as controlling in business affairs. Courts of equity do not attempt to enforce the golden rule, or even sound principles of commercial morality or expediency, by the writ of injunction.

Coming now to the facts of the case before this court we find, at the beginning of the line of dealers whose right to contract and right to a free market must be recognized, the complainant, a manufacturer and an employer of labor, on the one hand, and a free combination of about twenty-five former employes of the complainant on the other. No one has suggested in this case that these two parties are not wholly within their respective rights in the conduct which they have voluntarily pursued. The motives of the free combination of employes for refusing to renew their contracts of employment, whether moral or im-

moral, "malicious" or benevolent, are entirely beyond judicial inquiry.

Passing a step further we find the customers of the complainant, the boss carpenters and contractors of Hudson county. If these boss carpenters voluntarily combine to refrain from purchasing goods from the complainant, they would thereby violate no right of the complainant, and the complainant would have no action at law or in equity against them, notwithstanding the fact that this combined action, this entirely voluntary boycott, might cause great damage to the complainant in its business. These boss carpenters might notify the complainant that if it employed non-union workmen they would cease to deal with it, or they might by their threat of a voluntary removal of their custom in any other way dictate to the complainant how its business should be conducted, and in fact coerce the complainant to discharge its non-union hands and re-employ the strikers. That such coercion cannot constitute the tort with which we have to deal has sometimes been overlooked. In such case the plaintiff's right of free market is not violated. The boss carpenters are simply exercising their absolute right to refrain from contracting. Each of the two dealers is free, and each has the full advantage of the freedom of the other.

Passing still a step further we come to the employes of the boss carpenters. We have now four parties to the affair in hand, and the situation has become more complex, but, after all, there is no difficulty, it seems to me, in solving the problems which the situation presents. The employes of the boss carpenters, in the exercise of their absolute unquestionable right to refrain from being employed, and their further unquestionable right to do this thing in voluntary combination, may, from good motives or bad motives, notify the boss carpenters that if they take "unfair" material from the complainant they will cease to renew their contracts of employment, and thus the boss carpenters may be coerced to refrain from dealing with the complainant, and this coercion may in turn coerce the complainant to discharge its non-union men and take back the strikers. Still we have no case of coercion which can constitute the tort with which we are dealing, because at the very basis of the entire series of transac-

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tions which we are examining we find only a free combination of dealers exercising their absolute right to refrain from dealing, so that all inquiry into motives is excluded. The tort under consideration, which necessarily involves coercion, consists in a violation of some dealer's right to a free market. In the case which we have now reached there is no such right belonging to the complainant or to its customers, the boss carpenters, which is in any way invaded. Coercion which results, however, directly and intentionally from the exercise of the absolute right to refrain from contracting cannot possibly be a tort, because it violates no legal right. It is a mere incidental result of the assertion and enjoyment of a right.

Taking one more step, at last we come to the defendants. If it appeared that these defendants, individually or in free combination, were merely exercising their right to refrain from contracting, then, no matter how damaging to the complainant such conduct might be, no right of the complainant would be violated, and the defendants would be guilty of no tort.

I know of no reason why the chain which I have been following up, link by link, might not be indefinitely extended. The employes of the boss carpenters in turn might be constrained by a most powerful coercion to refrain from continuing in the employ of their masters by a voluntary combination of other dealers in labor or merchandise, but if this last set of dealers were merely exercising their absolute right to refrain from contracting with the employes of the boss carpenters, unless these employes submitted to their dictation, it seems to me beyond all question that we have not yet reached any tort, or found anyone liable to an action at law or in equity for the relief of any of the parties in this long chain, no matter how enormous the pecuniary damage of such party might be.

But, in fact, we have come to the end of the chain, and we find that the powerful coercive force originating there which draws dealers away from the complainant at the other end of the chain is not the voluntary exercise of the right to refrain from contracting. The pull at the far end of the chain is given by the defendant Burgess, the business agent of this powerful labor organization in Hudson county, when he snaps his fingers, and

the employes of the boss carpenters against their will are coerced to refrain from renewing their contracts for labor with their employers by the fear of fines, expulsion from their labor unions, social ostracism and poverty.

6. The last question to be considered which is presented by the facts of this case is whether there is any justification shown for the interference with the complainant's market by the coercion exercised upon the employes of the boss carpenters by these defendants or the labor organization which they represent.

It may be conceded that the coercion may be justified, and hence may not constitute a violation of anyone's right to a free market, precisely as persuasions and inducements may be justified so that they cannot constitute the tort which consists in *causing* the breach of a contract.

The concrete question in this case is whether these employes of the boss carpenters, by voluntarily joining these labor unions, and subjecting themselves to the by-laws and regulations of these unions, and the control of its officers and agents, deprive the coercion which is exercised upon them of all illegal taint. This is the only question in this case which seemed to me to be open to debate. In the first place, it must be borne in mind that the boss carpenters are not here in court making any complaint. The coercion was exercised upon them, and they may have suffered on that account, but it is not their grievance which is being redressed in this suit. As we have seen, it is the interest of the complainant in their freedom to deal in the labor market, and not their own interest in their freedom to deal in that market which this court in this suit is asked to protect. Suppose it be conceded that these employes may surrender their liberty to the arbitrary power of this immense organization, and agree that this power can be exercised whenever a business agent of the organization speaks the word. They can only surrender the interest which they themselves have in their liberty.

I certainly do not propose to question the lawfulness of fining or expelling and consequently threatening to fine and expel members of labor unions who disobey the laws to which they have voluntarily subjected themselves. It is impossible to give the time necessary for an exhaustive discussion of this some-

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what novel subject. Let it be conceded for the purposes of this case that labor unions may lay down many rules for the guidance of employers in the conduct of their business and prohibit by by-laws or otherwise their members from working for employers who disregard those rules. Employers, for instance, who expose their employes to dangerous machinery or unwholesome conditions may find that they cannot readily employ union men, and union men who, in violation of the by-laws of their unions, engage themselves to such employers, may be exposed to fines or expulsion from their unions. These and other similar cases, the status of which in the eye of the law I do not pause to consider, present the use of the penalties of fine and expulsion for the purpose of advancing the legitimate objects of the union.

When, however, the threat of fine and expulsion is employed for the purpose of coercing the employes of a large number of different employers to refrain from renewing their contracts for labor in order to coerce all these employers to boycott the complainant, with the ultimate object of coercing the complainant in respect of a matter with which the employes who are first coerced have absolutely no concern whatever, then it seems to me the whole scheme becomes an attack upon the complainant's right to a free market. No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employes who are first coerced, made by them when they enter their labor unions, can, in my judgment, affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employes are permitted to exercise their liberty. The employes may be able to surrender their own right, but they certainly cannot surrender the right of other parties. *Boutwell v. Marr, supra*, and *Berry v. Donovan, supra*, I think fully sustain the view that no justification has been shown in this case.

If two thousand five hundred workmen in Hudson county could, by permitting themselves to be organized into labor unions, surrender not only their own right to freedom in respect of making contracts, but also destroy the interest of all

other dealers in that freedom, the whole foundation of the right to a free market would be swept away.

7. Other theories have been advanced to sustain injunctions in strike and boycott cases similar in scope to the one which was issued in this case, and also injunctions of much wider scope. There is authority for the proposition that all men have a legal right "freely to pursue their lawful calling"—per Justice Hawkins, afterwards Lord Brampton, *Allen v. Flood*, A. C. 16 (1898)—which right has otherwise been stated as the "liberty" of every man "to earn his own living in his own way." Per Lord Lindley, *Quinn v. Leatham*, A. C. 534 (1901). The tort, which consists in the violation of this right, is generally defined or described as the "malicious" doing of anything causing damage to a man in his business or in the enjoyment of his means of livelihood "without justification or excuse."

I incline to think that such generalizations are too wide to have much of any practical utility, and that the result of their use is simply that nothing is decided in any case until the question of justification or excuse is settled. Lord Herschell, in delivering his opinion in *Allen v. Flood*, says: "In my opinion, a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification." A. C. 139 (1898).

The use of the word "malicious" in the definition of the class of torts under consideration seems to me to lead inevitably to error and confusion. One definition of malice, which was quoted with approval in *Allen v. Flood*, makes it mean "a wrongful act done intentionally without just cause or excuse." A. C. 13, 94 (1898). This definition is manifestly inaccurate, because no just cause or excuse can be allowed for any *wrongful* act. If we substitute in the definition of malice the phrase "an act causing damage" for the phrase "a wrongful act," then the definition which we are considering would stand as follows: "The intentional doing of any act which causes damage to a man in the prosecution of his business or the enjoyment of his means of

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livelihood, without justification or excuse, is malicious, *i. e.*, unlawful, and therefore actionable."

Whatever definition of malice may be laid down, the weakness of these broad generalizations, in my judgment, lies in the fact that they are practically useless. Scores of cases, I think, may be stated which would come fairly within these broad principles, but in which, nevertheless, a nonsuit would be granted. This view is indicated by Lord Herschell in the language above quoted.

There is the highest political, if not judicial, authority in this country for the proposition that all men have a right to "the pursuit of happiness," and that this right is so absolute that it is inalienable. But would anyone engaged in the practical administration of justice in a particular case define as a tort the intentional or "malicious" interference, without justification or excuse, with the plaintiff's right to the pursuit of happiness to the plaintiff's damage? Such a generalization embraces a large part of the law of torts. It seems to me that we have all the benefit of these very wide propositions in the one ancient maxim, *sic utere tuo ut alienum non laedas*.

8. Instead of formulating any novel rights or defining any novel torts, it might seem to some minds that the injunction ordered in this case is warranted upon the theory that the defendants are guilty of a tort which is in substance a private *nuisance* highly injurious to the complainant, and subject to interdiction by an injunction of a court of equity under well-settled rules. The common law protected the market. It punished forestalling, engrossing and regrating. A man has a natural right to buy goods that are offered for sale, and yet the common law made him a criminal if he bought up goods with the intent and with the effect to deprive his neighbors of the means of supplying themselves with similar goods excepting from him, and at a price therefor dictated by him. The violation of the right to a free market by unjustifiable coercion, which has the effect to prevent a party from satisfying his wants in the market, may perhaps be deemed a species of nuisance. It is, however, a mere matter of names and labels which we are now discussing.

9. I have purposely avoided the discussion of authorities in stating the various propositions above set forth because any such discussion would expand each proposition into a treatise. It is difficult, however, to avoid some examination of the cases of *Allen v. Flood* and *Quinn v. Leathem*, inasmuch as those two cases must be reckoned with in any strike or boycott decision at the present day. The conflict of opinion among the eminent judges who took part in the decision of these cases, and the inconsistency of some of the opinions rendered in support of the same side, warrant, I think, the utmost freedom of criticism whenever either of these cases is cited as an authority.

What I desire to point out in regard to *Allen v. Flood* is that, while we have a chain of coercion similar to the one with which we have dealt in this case, the coercion in fact originated in the voluntary combination of employees. According to the view of the facts which was adopted by the majority of the house of lords, the defendant, who was an officer of the labor organization of the employees, had no power to order a strike, and in fact merely undertook to *announce* what they (the employees) in free combination had voluntarily resolved to do. He did not announce that he, in the exercise of the enormous power of a labor organization, would compel, by coercion, the employees of the Glengall Iron Company to strike if that company did not discharge and refuse to further employ the plaintiffs. The case, therefore, when confined to its facts as ascertained by a majority of the court, without regard to what the eminent judges said in deciding it, presents, in my opinion, a clear instance of the exercise of the absolute right of employees to combine voluntarily and concurrently to refuse to continue in employment unless their employer will submit to their "dictation" in regard to the management of his business. It is true that the case does not decide that these employees possessed this absolute right about which no inquiry into motive or purpose can be tolerated. The case merely decided that the officer of the labor organization in announcing to the employer what the employees in combination had resolved to do, was guilty of no tort. Lord Watson, however, in his opinion—*A. C. 99 (1898)*—states that if the employees in combination had for themselves given the coercive notice to the

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Glengall Iron Company under the influence of "bad motives towards the respondents, then, according to the law which has been generally accepted by the courts below, they would each and all of them have incurred responsibility to the respondents." It is perhaps not quite clear that Lord Watson disapproved of this law which he says had been "generally accepted by the courts below," but I do not think that any other of the majority judges in *Allen v. Flood* approved of such doctrine. Such doctrine, although sustained by much that is said in *Quinn v. Leatham*, is, of course, utterly inconsistent with the absolute right of employes in combination to refrain from contracting as hereinbefore set forth, and I think that any such doctrine is entirely inconsistent with the most if not all the authoritative American decisions.

It is certainly important to note that, in dealing with the alleged tort of the defendant in *Allen v. Flood*, no question of the effect of a combination "amounting to a conspiracy" had to be considered, inasmuch as the fact was established that the defendant acted alone.

In my opinion the question submitted by the trial judge to the jury in *Allen v. Flood*, whether the defendant "maliciously induced the Glengall Iron Company not to engage the plaintiffs or either of them," was, in a large degree, unintelligible, because of the use of the word "maliciously." *Flood v. Jackson*, 2 Q. B. 24 (1895). For all that appears in the reports of the case the jury may have taken the word "maliciously" in the popular sense, implying ill-will. The plaintiffs, however, in their declaration expressly charged that the defendants had wrongfully "intimidated and coerced" the plaintiffs' employer to discharge them and to refuse to make new contracts with them. A. C. 11 (1898). The plaintiffs, of course, had full opportunity to prove their case and presumably offered all the evidence which they had to establish that case. Even if the case was mistried and the real issue of fact was not presented to the jury for determination, what the house of lords appears to have done was to decide that a verdict should have been directed for the defendant. With such a ruling any error on the part of the trial court

in charging the jury, or any mistake of the jury in answering questions put to them, became immaterial.

It is, I think, a very curious circumstance connected with this case of *Allen v. Flood*, that the evidence left it doubtful whether the defendant notified the Glengall Iron Company that if the company did not discharge the plaintiffs "their men would be called out," or merely that their men would "knock off." *A. C. 71 (1898)*. If the defendant, as the representative of the labor organization, had the power to force these men to strike, which the majority of the court found not to be the case, or the Glengall Iron Company thought he had that power, then it seems to me that his liability in the action in respect of this part of the plaintiffs' claim might depend upon which of these two announcements he made to the plaintiffs' employer.

In the case of *Quinn v. Leathem* we have a chain of coercive action precisely the same as the one presented by the case at bar down to the last link. In *Quinn v. Leathem*, as in this case, the defendants were officers of a labor union, and this union controlled the employes of a butcher. The defendants wielded the entire power of the union. The employes of the butcher were bound to obey the defendants and strike whenever they gave the word. The butcher was a good customer of the plaintiff and every week took from him large quantities of meat. The defendants, in order to compel the plaintiff to discharge certain employes, coerced the butcher to refrain from dealing with the plaintiff, and they effected this coercion by announcing to the butcher that if he did not discontinue his dealings with the plaintiff they (the defendants) would "instruct" the butcher's employes to strike. *A. C. 517 (1901)*. It clearly appears that the announcement or threat made by the defendants to coerce the butcher to refrain from dealing with the plaintiff was to the effect that the defendants would coerce the employes of the butcher to strike. *Quinn v. Leathem* therefore, when examined strictly with reference to its facts, and without regard to the opinions of the great judges who decided the case, is on all fours with the case now before this court, and will stand in the future, I think, as a precedent supporting the right to a free market. At the end of the chain in *Quinn v. Leathem* we find what con-

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spicuously exists in this present case, viz., a coercive force upon the plaintiff's customer, exercised not by a voluntary combination of the customer's employees in the enjoyment of their absolute right to refrain from further employment without challenge as to their motives, but by a party who applies coercion to the employees so as to constrain them against their will to refrain from such further employment, such fundamental and final coercion not resulting from the exercise of any right such as the right to contract or refrain from contracting.

Of course, it cannot be claimed that the judgment of the house of lords, in *Quinn v. Leatham*, was rested upon the right which I have recognized as underlying the order in this case, and which I have called the right to a free market. On the contrary, the judges, with practical unanimity, placed their decision, in part at least, upon the ground that the party defendant happened to be not a single officer of the labor organization, as in *Allen v. Flood*, but five persons who were officers or agents acting for a labor organization. One question which the trial court put to the jury was whether the defendant "maliciously conspired to induce the plaintiff's customers or servants not to deal with the plaintiff." The judges substantially agreed that the element of "conspiracy" entered into the conduct of the defendants, and that the addition of this element opened the inquiry as to the defendants' motives and objects in their combined action. Lord Chancellor Halsbury emphasizes the fact that the defendants had acted "in pursuance of a conspiracy framed among them," and "with malice, in order to injure the plaintiff." *A. C. 506 (1901)*. He further points out (at *p. 506*) that "there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights are abundantly proved." If there was "interference with the plaintiff's legal rights," that fact would seem to put an end to all further discussion. There is always danger in using such phraseology as that quoted above from the lord chancellor that definite legal conceptions will be displaced by indefinite terms of abuse.

Lord McNaughton (at *p. 510*) expresses the opinion that the proposition is sound that "a conspiracy to injure resulting in

damage gives rise to civil liability." Lord Shand and Lord Brampton substantially subscribe to the same doctrine. Lord Brampton even said (at p. 535) that the cause of action was "not dependent upon coercion to break any particular contracts, though such causes of action are introduced into the claim, but the real and substantial cause of action is an *unlawful conspiracy* to molest the plaintiff, a trader, in his business, and by so doing to invade his undoubted right," viz., his right to regulate his business "according to his own discretion and choice." Of course, if a conspiracy is "unlawful," and causes damage, there can be little question about the liability of the conspirators. It seems equally clear that if what the defendant does invades the "undoubted right" of the plaintiffs, he is liable whether he acts alone or in association with others as a band of "conspirators."

Lord Lindley alone, so far as I have observed, points out (at p. 534) that the plaintiff's right to earn his own living in his own way involved the liberty of dealing "with other persons who were willing to deal with him," and that this "liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so." Lord Lindley then proceeds to use this most significant language: "Any interference with *their* liberty to deal with him affects *him*. If such interference is justifiable in point of law he has no redress." In these expressions I think the right to a free market is clearly indicated.

In dealing with the facts of the case (at pp. 537, 538) Lord Lindley points out that in *Allen v. Flood* the defendant "had no power to call out the men, and the men had determined to strike" before the defendant had anything to do with the affair, and continues as follows: "But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasions. It may be that in *Allen v. Flood* there was nothing more, but here there was very much more. What may begin as peaceable persuasions may

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easily become, and in trades union disputes generally does become, *peremptory ordering*, with threats open or covert of very unpleasant consequences to those who are not persuaded. (*Calling workmen out* involves very serious consequences to such of them as do not obey. * * * A threat to call men out, given by a trades union official to an employer of men belonging to the union and willing to work with him, is a form of coercion, intimidation, molestation or annoyance to them, and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case."

In my opinion this last-quoted statement of Lord Lindley expresses a doctrine which fully sustains the judgment in *Quinn v. Leathem*, and renders all discussion of "malicious conspiracy" and conspiracy with bad motives entirely unnecessary. If, as in *Allen v. Flood*, the defendant in *Quinn v. Leathem* had been a single officer of this powerful organization, and without conference or solicitation with anyone had threatened to order a strike which he had the power to order, it is not quite clear upon what ground a judgment against the defendant would have been sustained. There can be no doubt upon what grounds Lord Lindley would have sustained such a judgment. He positively rejects the argument which he says was made at the bar to the effect that if the defendant had been a single person his conduct would not have been actionable, and he concludes as follows: "One man exercising the same control over others, as these defendants do, could have acted as they did, and if he had done so, I conceive that he would have committed a wrong toward the plaintiff for which the plaintiff could have maintained an action."

The deliverances of these learned judges in *Quinn v. Leathem* in regard to the tort which consists in a "malicious conspiracy" to injure a man in his business, seem to indicate that if in *Allen v. Flood* the action has been brought against the employes of the Glengall Iron Company instead of against the single officer of their labor union who merely announced what they were "conspiring" to do, a judgment for damages against these employes would have been sustained. This result accords with the statement of Lord Watson quoted above from his opinion in *Allen*

v. *Flood* in regard to the law which had been "generally accepted by the courts below." It may be, however, that the English courts would draw the distinction between a voluntary combination of employes to use their power concurrently to refrain from further employment in order to secure the conduct of their employer's business in accordance with their ideas, and the action of two or more *outside* parties who for the same purpose intervene in an affair with which they have no direct interest and undertake by any means coercive or persuasive to cause those who are interested to use their combined power. If such a distinction should be taken while a possible conspiracy exists in either case, the motive actuating one combination might be deemed bad or "malicious" while the same motive actuating the other combination might not incur judicial condemnation. Such a distinction, however, in my opinion, leads to the recognition of a wider right than the right to a *free* market, and indicates that all dealers in the market are to be protected not only against unjustifiable coercion of persons who without such coercion would deal with them, but also against unjustifiable interference from outside parties by meddlesome persuasions and other non-coercive "inducements" causing disturbance to the *natural* market conditions upon which dealers make their calculations and invest their money.

10. I have discussed and criticised a number of legal theories in order to endeavor to show that the rejection of these theories does not involve any modification of the order for an injunction which was made in this case. That order, as I stated at the start, is directly sustained on the facts by the decision in *Templeton v. Russel*, *Quinn v. Leathem*, and a large number of American cases. If the doctrines announced in these cases, and especially in *Quinn v. Leathem*, are sustained, the order made in this case must necessarily be sustained; but if the doctrines announced by the judges in *Quinn v. Leathem*, and which I have criticised, are all rejected, the far narrower *ratio decidendi* of this case arising from the recognition of the right to a free market, which I have endeavored to expound, remains unaffected. My object, therefore, has not been to overthrow these legal theories which I have been criticising, but to show that

even if they are false the order of this court in this cause still may stand.

It is not necessary, for the purposes of this case, to admit or deny the soundness of the doctrine that a conspiracy, i. e., a combination of two or more persons to cause damage, which in fact results in damage, gives rise, or may give rise, to civil liability, even though the same conduct pursued by one person would involve no liability whatever. What I want to try to establish is that a resort to the element of conspiracy in cases like *Quinn v. Leathem* and the one now before this court is entirely unnecessary, and by obscuring the subject under discussion interferes with the correct analysis of the plaintiff's right and of the defendant's tort.

The views which I have suggested in regard to the case of *Quinn v. Leathem* and the opinions of the judges delivered in deciding that case may be summed up as follows:

First. The right of the plaintiff which was vindicated was the right to a free market, and it was, as I have just stated, quite unnecessary to assert on the plaintiff's behalf the right to be protected against a conspiracy to damage his business, unless the conduct of the defendants complained of might have been pursued with impunity by a single defendant. The invasion of the plaintiff's right and the tort of the defendants consisted in the coercion exercised by them on the plaintiff's customer Munce by threat to coerce Munce's employees into a strike. This tort, as Lord Lindley shows, might be committed by a single defendant.

Second. If the employees of Munce had *voluntarily* combined to coerce him to refrain from dealing with the plaintiff by merely exercising their absolute right to refrain from contracting further with him (Munce) unless their demands were complied with, then those employees would have been guilty of no tort recognized by our American law, and no inquiry into their motives would be allowed.

Third. Whether a plaintiff who has been damaged in his business in a case like *Quinn v. Leathem* by coercion of his customers, effected by causing or threatening to cause the employees of such customers to strike by mere persuasions, payment of money, or any other non-coercive inducement, has a cause of action against

the person or persons who have so caused such damage is a question not raised in this present case. When such a case is presented it seems to me that the question of conspiracy, *i. e.*, the significance of a combination of two or more defendants, will come up only after it has been determined that the plaintiff had no right to natural market conditions as against unjustifiable interference by outside parties exercising the non-coercive inducement.

Fourth. If in these strike and boycott cases the element of a conspiracy is to be found, it would seem that there must be a combination among the defendants which brings to bear upon the plaintiff an aggregation of evil minds. This notion lay at the basis of the common-law crime of conspiracy. One man might resolve to cause, and undertake to cause, some damage to another without incurring criminal or civil liability, but if two or more men combined to do the same thing their conduct became oppressive. The increase of power from an aggregation of evil minds and wills constitutes the gist of the criminal offence of conspiracy.

Several of the English judges in these recent strike and boycott cases have intimated the opinion that for the same reason which sustained the criminal offence of conspiracy a combination of defendants in a case like *Quinn v. Leathem*, actuated by bad motives and causing damage to the plaintiff, constitutes a tort and creates civil liability, the combined action of two or more persons being an essential element of such tort. This reasoning may apply correctly to the voluntary combination of employes or employers, vendors or purchasers, acting together with intent to damage the plaintiff, and in fact causing such damage. In this case, however, notwithstanding the rule which, according to Lord Watson, had been "generally accepted" in the inferior English courts, and notwithstanding what Lord Chancellor Halsbury and other judges said in *Quinn v. Leathem*, I feel quite sure that the accepted American view sustains the absolute right of the combined body of employes or other dealers to refrain from contracting as they may see fit, however wicked or "malicious" their motives may be. But in all these cases of voluntary combinations of dealers we have presented one essen-

2 Buch.Booth & Brother v. Burgess.

tial element of a conspiracy, viz., an enormous increase of power for evil arising from an aggregation or combination of evil minds.

But in cases like *Quinn v. Leathem*, as Lord Lindley has distinctly pointed out, the fact that the party defendant consists of two or more persons is a mere accident. It is true that in *Quinn v. Leathem* the power for evil resulted from a combination, but this combination was not that of the two or more defendants. The oppression and coercion resulting from the *combined action* of Munce's employees was the result of coercion upon them which required no combination in order to its exercise in the most complete degree. The employees of Munce, whose coerced combination was the menace which constrained him to refrain from dealing with the plaintiff, were not conspirators voluntarily and willfully uniting their several evil minds to oppress the plaintiff. On the contrary, they were victims. In the case before this court the employees of the boss carpenters are not conspirators willfully combining to do damage which each of them severally would be powerless to effect. It is, as I have undertaken to show, an essential element of the defendants' tort in this case that they coerce the employees of these carpenters to refrain from further contracting with their employers. The moment it appears that these unfortunate employees are willful conspirators the whole foundation of the plaintiff's claim that his right to a free market has been violated immediately disappears.

For the reasons indicated, it seems to me inadvisable to base the liability of the party defendant in cases like *Quinn v. Leathem* and the present case, when such party defendant happens to consist of more than one person, upon any theory of conspiracy.

In the foregoing discussion no distinction has been drawn between coercion of a single dealer or customer in the market and coercion of a large number of dealers or customers. As a matter of fact, in these boycott cases we have presented in every instance coercion of a number of dealers, or a class of dealers, and it is this sort of coercion of which the plaintiff complains. The tort in cases like *Quinn v. Leathem* and the present case consists essentially in the creation by coercion of an involuntary

Cramer v. Cale.72 Eq.

combination, but the persons in combination are not conspirators, and are not made defendants in the suit. The party defendant, whether a single person, or two persons, or ten persons, should, I think, plainly be regarded as a unit.

JOHN PRATT CRAMER and ALFRED C. MCCLELLAN

v.

WARREN M. CALE et al.

[Decided October 23d, 1906.]

1. In a contest between creditors and the wife of their debtor, where she seeks to sustain a conveyance as a security for a debt, the burden is on her of showing the amount of the debt sought to be protected, and is not discharged by a mere general statement regarding the amount due.

2. Evidence examined, and the conveyance to the wife *held* to be only a mortgage, given to secure whatever advancements of moneys she may have made from her separate estate, the equity in the property comprised in the deed of conveyance being subject to the payment of complainants' debt.

On pleadings and proofs.

Mr. Eli H. Chandler, for the complainants.

Mr. Charles C. Babcock, for the defendants.

BERGEN, V. C.

On the 14th of March, 1904, the complainants and defendant Warren M. Cale executed a bond to a trust company in Atlantic City. A breach of the condition of the bond occurred, and in the month of April, 1905, their liability under the bond being ascertained, so far as it could then be, the obligors executed and delivered a promissory note for the deficiency. The complainants, being required to pay the note without the assistance of Warren M. Cale, one of the makers, commenced a suit against

*2 Buch.**Cramer v. Cale.*

him for his proportion, which resulted in a judgment, entered April 14th, 1906, for \$2,809.71.

At the time the debt upon which the judgment is founded was created the defendant Warren M. Cale was the owner of real estate in Atlantic City, particularly described in the bill of complaint, and thereafter, by deed dated June 10th, 1905, but not acknowledged until June 21st, he conveyed the property to Sarah A. Zimmerman, who in turn conveyed it to Edna, the wife of Warren M. Cale, by deed acknowledged November 10th, 1905. The consideration expressed in these deeds was one dollar and other good and valuable considerations. No consideration was in fact paid at the time of the conveyances, and it is admitted that their sole purpose was to transfer the title from the husband to his wife. The husband acquired the property in 1902, paying therefor the sum of \$12,000, which he satisfied by other property and cash to the extent of \$6,000, and by accepting title subject to a mortgage of \$6,000. The testimony shows conclusively that when the conveyance was made to the wife the husband was in an embarrassed financial condition; that the bond executed by him with the complainants was in default, and was so recognized by him when he joined with the complainants in making the note in satisfaction of the then ascertained deficiency, and it is admitted that after he had stripped himself of the property conveyed to his wife he had no estate to meet his maturing obligations.

It therefore appears that when the debt was incurred upon which the complainants' judgment is based the defendant was the owner of an equity in real estate worth at least \$6,000; that thereafter, becoming financially embarrassed and unable to meet his just obligation, he caused the property in controversy to be first transferred to Sarah A. Zimmerman (then in his employ), who held the title from June until November, 1905, when it was conveyed to his wife. This condition of affairs, if not explained, justifies the presumption that the conveyance was fraudulent, and made with intent to hinder and delay creditors in the collection of their debts. The wife, however, seeks to justify the conveyance upon the ground that when she married the defendant Cale she was possessed of personal property amounting to

about \$6,000; that, commencing in 1901, she had advanced money to her husband, which he was to repay by putting it in a home, the title to which would stand in her name, and in satisfaction of this promise the conveyances above referred to were made, and that after such conveyances were made she continued to advance money to her husband until the total sum amounted to \$5,700. The husband and wife both testified that the sum last mentioned was about the amount advanced and received, but beyond the production of checks, amounting in the aggregate to \$631, covering a period beginning in August, 1900, and ending in October, 1905, there is no evidence beyond the statements of the husband and wife, given in the broad terms above recited, to sustain the claim that the wife advanced to or entrusted her husband with the large sum which they now allege to be due from the husband to the wife. No account was ever kept by either, nor was any settlement made, or attempted to be made, to ascertain the amount due at the time this conveyance was made. The wife testified that she had produced all of the checks which she could conveniently find relating to the transactions between them, although other checks may be packed away in her house, but as she was evidently aware that it was necessary to support her claim by producing checks which she had given to her husband, the neglect on her part to search in the only place where she testifies she would be likely to find others, if there were any such, justifies the conclusion that she had no expectation that any such search would put her in possession of other checks to her husband. She knew the importance of the checks in establishing her claim, because she produced certain of them, and it is difficult to account for the non-production of others, which were within her reach, except upon the theory that they do not exist. This is a contest between creditors and the wife of their debtor as to the right of priority in payment, and the facts must be critically examined. A party seeking to sustain a conveyance as a security for a debt would have, and ought to have, the burden of showing the amount of the debt sought to be protected, and it seems to me that this rule ought to be more rigidly applied in the case of an alleged secret trust between a husband and wife, and that something more than a general

2 Buch.Cramer v. Cale.

statement regarding the amount due ought to be forthcoming to sustain such a claim. This wife claims that the property was to be conveyed to her; the husband testifies that it was not conveyed to her earlier because it would affect his credit, and it is hardly consistent with equitable principles to permit a wife, under such circumstances, to absorb all the property of her husband, to the exclusion of his other creditors, without more convincing proof of the amount of the debt due from the husband to the wife than they have seen fit to present in this case. Under the circumstances shown, I am of the opinion that the conveyance to the wife must be held to be only a mortgage, given to secure whatever may be found due to her, and to that extent only is she entitled to protection in preference to the debt of these complainants, and that beyond securing the wife to the extent to which she has advanced her husband moneys from her separate estate the equity in the property should be made subject to the payment of complainants' debt. It therefore becomes important to determine the amount due to the wife which it was intended should be secured.

Transactions of this character, having for their object the creation of a preference over other creditors of the husband in favor of the wife, must be regarded with suspicion, and where a conveyance for such purpose is attacked for fraud and collusion, it is incumbent on the wife to show the correctness of her claim, to secure which the conveyance or mortgage was given. Especially is this so when the conveyance is made under suspicious circumstances. A conveyance, by way of preference, to a wife, made by the husband upon the eve of insolvency, to secure a debt which had been accruing during a period of five years just previous to the insolvency and conveyance, imposes upon the wife the burden of showing, with reasonable certainty, not only that she had a separate estate, but also the sums advanced to or paid out for her husband from her separate estate. There is no presumption that such advancements were intended as gifts, but the confidential relations existing between a husband and wife would make a fraud easily accomplished unless the wife is called upon to show by affirmative proof, and with some little regard to detail, the amount for which she should be preferred, where the

contest arises between the wife and creditors of her husband, whose debts existed before the conveyance, and which were incurred while he was the ostensible owner of the property.

As was said by the court in *Seitz v. Mitchell*, 94 U. S. 580: "Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which she must overcome by affirmative proof."

In the present case the wife had received from the estate of a former husband, five years before her second marriage and nearly ten years before the conveyances complained of were made, about \$6,000, and she was able to give, with great particularity, the sources from whence it came and the different amounts received at that time going to make up the total, but, with the exception of some bank stock, a portion of which she still holds, she gave no testimony regarding its subsequent investment, or the sale of the securities in which it was invested, if ever invested, in order to raise money for her husband, and, aside from several checks drawn to the order of her husband for different sums aggregating \$631, and covering a period of five years, she was unable to state, with any particularity, at what time she advanced other moneys, or to give the amounts, and calls upon the court to adjudge to her as due from her husband \$5,700 upon her unsupported statement, and that of her husband, that about that sum had passed to the husband's hands. Not the slightest attempt was made to give any of the ordinary details which usually surround such transactions, and we are asked to rely upon the bald statements of the wife and husband that at different times during a period of five years the estate of the wife, to the extent claimed, was given to the husband by her, to be used as he saw fit. To assume that such testimony is satisfactory proof of a husband's debt to his wife would open the door to unlimited fraud. The conveyance of lands by insolvent husbands to their wives, in satisfaction of an alleged secret trust

2 Buch.Cramer v. Cale.

between them, is becoming too common to justify a court of equity in supporting such claims without satisfactory proof that the trust exists, and the character of the proof should be such as to convince the mind of the court that there is a debt due to the wife, and also disclose, with some detail and precision, the amount of it, for "claims of this kind should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties themselves, uncorroborated by other proof, they should be rejected at once, unless their statements are so full, clear and convincing as to make the fairness and justice of the claim manifest. Any other course will encourage fraud and multiply the hazards of most business ventures." *Besson v. Eveland*, 26 N. J. Eq. (11 C. E. Gr.) 468, 472. The wife has not maintained the burden cast upon her by any evidence that would justify a finding in her favor beyond the sum of \$631. Her case was well prepared and tried by able counsel. The checks showing payments which she produced covered nearly the whole period of her married life, and the fair presumption is that she had produced all that she has. As I have before stated, she claimed that some of her checks are at the house on the disputed property, and that they were so packed away that it was not convenient to examine them, but in the usual course of events checks that are preserved are filed with reference to their dates, and it is difficult to understand how she was able to produce checks covering a period of five years without having had access to the other checks given during the same period, nor does she offer any explanation of this strange circumstance, and I am inclined to the belief that all of the checks showing payments to the husband during the disputed period were selected and produced at the trial.

The conclusion which I have reached is that the wife is entitled to have her conveyance stand as a mortgage to secure the payment of \$631, and that the complainants' judgment be decreed to be a lien upon the lands mentioned in the bill of complaint, subject to the payment of \$631 to the wife and the mortgage of \$6,000 which encumbered the property at the time of the conveyance to the husband, the testimony showing that there was no other encumbrance on the property when it was transferred to the wife.

Edge v. McClay.

72 Eq.

WALTER E. EDGE

v.

JOHN H. McCLAY.

[Decided October 26th, 1906.]

Where payments under a building contract were due on the certificate of the architect, a stop notice served on the owner on the day after the last certificate was given was insufficient to give the party serving the notice priority over other persons holding orders of the contractor upon the owner.

On bill of interpleader.

Messrs. Bourgeois & Sooy, for the defendant John T. French.

Mr. Eli H. Chandler, for the defendant Fred. T. Moore.

Mr. Theo. W. Schimpf, for the defendant Charles F. Horner.

Mr. John D. McMullin, for the Eastern Hydraulic Pressed Brick Company.

BERGEN, V. C.

The questions to be disposed of arise under this bill for interpleader, and the facts are not disputed. The complainant, upon filing his bill, paid into court \$3,255, and, after taking an order requiring the defendants to interplead, was dismissed. The claimants and the amounts due them are as follows: John T. French, \$1,650; Eastern Hydraulic Pressed Brick Company, \$444.47; West Side Lumber Company, \$1,900; Charles S. Horner, \$150. The first three claimants named assert their right to the fund under orders given by the contractor to the owner, which are in their nature equitable assignments of the fund to the extent named in each order. The claim of Horner

2 Buch.Edge v. McClay.

is based upon a stop notice under the Mechanics' Lien law, which was served on the 3d day of January, 1906, and the only question of doubt relates to the position, in order of priority, of Horner. It appears that under the terms of the contract for the buildings payments were due on the certificate of the architect, and the last certificate was given January 2d, 1906. The contention of the other claimants is, that the contractor's disposition of the fund by the various assignments which he made thereof became effective on the 2d day of January, and that therefore there was no money in the hands of the owner when the notice of Horner was served on the following day. This question has been disposed of contrary to the contention of Horner by Vice-Chancellor Grey, in *Flaherty v. Atlantic Lumber Co. et al.*, 58 N. J. Eq. (13 Dick.) 467, 475. In that case the liability of the owner matured May 31st, 1897, and the notices were served at various times between June 1st and September 11th of that year, and in disposing of this question the vice-chancellor said: "As all of these statutory notices were served after the liability of the owner under the contract had matured on May 31st, 1897, and after the residue of the contract price had been thereby freed from the charge in favor of workmen and materialmen, they all failed to have any effect to compel the owner to retain anything for their payment from the contract price, and must all be rejected as claims upon the residue of the fund, which had, on May 31st, 1897, come to be at the disposal of the contractor, and liable to respond to orders given by him." The same rule was adopted by the court of errors and appeals in *Bayonne Building Association v. Williams*, 59 N. J. Eq. (14 Dick.) 617, 619. In that case one of the claimants, George W. Conklin, holding an order from the contractor on the owner, sought to secure an advantage by serving a stop notice after the maturity of the last payment. On this part of the case Judge Collins, speaking for the court of errors and appeals, says: "As the respondent Conklin served no notice before the final payment fell due under the contract, his lien expired, and he must stand simply as the holder of an order, and subject to all claims duly served under notices and under orders presented before his own."

McClave v. McGregor.72 Eq.

In the present case Horner held an order bearing date December 15th, 1905, and on the 3d day of January, 1906, the day after the maturity of the last payment, sought to obtain a preference by serving a stop notice. It is impossible to distinguish this case from *Bayonne Building Association v. Williams, supra*, except that Horner served his stop notice one day after the maturity of the owner's liability to pay to the contractor, and in the *Bayonne Building Case* some months had elapsed between the maturity of the owner's liability and the service of the notice. In my opinion, this can make no difference. If the stop notice can be served one day after the contractor is entitled to his payment, it may be served six months after, and this the court of errors and appeals has declared to be ineffective.

The fund in court will be distributed in the following order of priority—to John T. French, Eastern Hydraulic Pressed Brick Company, West Side Lumber Company and Charles S. Horner—so far as the funds applicable to such payments, and now in court, will extend.

JOSEPHINE D. McCLAVE et al.

v.

AUSTEN H. MCGREGOR et al.

[Decided November 2d, 1906.]

A bill reciting an agreement between the parties for the sale of real estate and charging that defendant has failed to comply with his contract of purchase, and that he has, by recording the agreement, cast a cloud over complainant's title, and praying for its removal does not state a case within § *Gen. Stat. p. 3486*, relating to suits to quiet title, and providing that where a person is in peaceable possession of lands, claiming to own the same, and his title thereto is denied, it shall be lawful for him to bring a suit to settle the title, &c., for complainant has an adequate remedy either by a suit for specific performance or for rescission.

On demurrer to a bill to quiet title.

2 Buch.McClave v. McGregor.

Messrs. Guild & Martin, for the complainants.

Mr. Thomas P. McKenna, for the defendants.

BERGEN, V. C.

It is sought to support the bill filed in this cause under an "Act to compel the determination of claims to real estate in certain causes and to quiet the title to the same" (3 Gen. Stat. p. 3486), and the effort is challenged by a demurrer. The stating part of the bill of complaint is not confined to those matters required in a bill of this character; on the contrary, it recites an agreement between the parties for the sale and purchase of real estate, and charges that the defendant has neglected to comply with his written agreement in that behalf, beyond the payment of \$2,500, made by him when the contract was executed, on account of the purchase price, which was \$20,000. The gravamen of the complainant is that the defendant McGregor, by recording the agreement in the register's office in the county wherein the lands are situate, has cast a cloud over complainant's title, to dispel which this bill was filed.

Numerous reasons were specified by the demurrant, but we are met at the threshold with the question whether the subject-matter of this bill of complaint falls within the class of cases for which the statute intended to provide a remedy.

The encumbrance or cloud upon this title, set out in the bill of complaint, was one created in part by the act of the complainant, and manifestly the issue to be tried is whether the defendant has so conducted himself as to deprive him of the right to have his contract with the complainant specifically performed, or the consequent loss by forfeiture of the large payment made by him on account of the purchase price, if such relief were denied him. If the complainant does not desire specific performance, but rather a rescission of his contract, he has a right to come into this court, and, upon presenting an equitable case, ask to have the contract rescinded and given up to be canceled of record, in the same manner as if the encumbrance was a mortgage without consideration, or fraudulently obtained, and registered in the proper office. An ample equi-

table remedy to remove this cloud on his title being at hand, I do not consider that the complainant is justified in an attempt to obtain a rescission of his contract under the statute which he now invokes, and I am of the opinion that his proceeding falls under the condemnation of the rule adopted by Vice-Chancellor Stevenson, in *Van Houten v. Van Houten*, 68 N. J. Eq. (2 Robb.) 358. The limitations attending a bill of this character are clearly analyzed and expressed by the late Chief-Justice Beasley, speaking for the court of errors and appeals, in *Jersey City v. Lembeck*, 31 N. J. Eq. (4 Stew.) 255, where he says: "The inequity that was designed to be remedied grew out of the situation of a person in the possession of land as owner, in which land another person claimed an interest which he would not enforce, and the hardship was that the person so in possession could not force his adversary to sue, and thus put the claim to the test. * * * In the present instance the complainant had it in his power, by one of the customary processes of the law, to bring to judgment the claim he wished to control, and it would therefore seem to be going out of the way to maintain that this statute is applicable in aid of his inaction. If a party in possession of land can throw the hostile claim into a course of law, and thus get rid of the cloud overhanging his estate, why should he not do it? And what reason is there to say that this act was designed to help a party who was in no strait, but of his own choosing?"

In the case now under consideration the complainant may proceed to enforce the specific performance of his contract, or he may return the money he has received, and ask that the contract be rescinded and given up to be canceled.

Under the view which I entertain, and have here expressed, this demurrer should be sustained, and a consideration and determination of the other causes of demurrer will serve no useful purpose.

The case of *Austen H. McGregor v. Hilman O. Carriere et al.*, in which the same question arose and which was argued by counsel at the same time, is controlled by the determination of this cause, and the demurrer in that case will also be sustained, with costs in each case.

2 Buch.Cook v. Weigley.

EMMA W. COOK et al., executors, &c.,

v.

WILLIAM W. WEIGLEY et al.

[Decided November 24th, 1906.]

The agreement of 1833, between the commissioners representing the States of New Jersey and New York, fixing the boundaries between such states, article 2, provides that the State of New York shall retain its present jurisdiction of and over the islands lying in the waters of the bay of New York.—*Held*, that such agreement did not deprive the State of New Jersey of that element of state sovereignty which permits the determination of the status and ownership of lands within the state limits, and hence the court of chancery has jurisdiction to enforce its decree of foreclosure of mortgage and sale of islands in the harbor of New York, but within the New Jersey boundary.

On demurrer to bill of review.*Messrs. Vroom, Dickinson & Scammell*, for the complainants.*Mr. Frank Durand*, for the demurrants.

BERGEN, V. C.

The decree which it is now sought to review and annul was made in the above-entitled cause adjudging the foreclosure of the equity of redemption in, and directing the sale of, certain lands for the purpose of paying a debt, to secure which the premises in dispute were mortgaged. The lands lie within the boundaries of the State of New Jersey, but within the harbor of the State of New York, and are islands surrounded by the waters of the Hudson river and the bay of New York, shortly described as "Robbins Reef" and "Oyster Island." The charge in the bill of review is that since the decree complained of was made, William W. Weigley, one of the defendants in the foreclosure suit, has discovered that under the terms of the compact or treaty made between the States of New York and New Jersey

in 1833, which was afterwards ratified and confirmed by the legislature of each state, and approved by the congress of the United States, it was agreed that the State of New York should retain its exclusive jurisdiction of and over Robbins Reef and Oyster Island, and that by virtue of such treaty this court had no jurisdiction over the subject-matter, and is without authority to enforce its decree of foreclosure and sale, and for that reason he is entitled to have the decree reversed and made void. To this bill a demurrer has been interposed, and as the principal issue relates to the construction of article 2 as expressed in said treaty in the following words:

"The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis' Islands, and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state,"

I shall not consider the other questions raised by counsel on the argument, because the conclusion to which I have arrived on the main point will dispose of the whole question. The situation presented is this: Weigley, as the owner of Robbins Reef and Oyster Island, mortgaged them to the complainant. These islands lie within the territorial limits of New Jersey, and the right to enforce the payment, at maturity, of the mortgage in the courts of this state is questioned, because by the terms of the treaty exclusive jurisdiction was retained by New York over certain islands, among which are those in question. The only foundation for this bill of review is the claim that the retention of exclusive jurisdiction, as expressed in said treaty, deprives the State of New Jersey of that element of state sovereignty which permits the determination of the status and ownership of lands within the limits of such state.

Unless I misinterpret the opinion of Mr. Justice Garrison in *Central Railroad Co. v. Jersey City*, 71 N. J. Law (41 Vr.) 31, it effectively disposes of the question here raised in favor of the demurrant. In this opinion the learned jurist distinguishes with clearness and accuracy the distinctive meaning to be accorded to "exclusive jurisdiction" and "sovereignty," respectively, in construing the treaty between the states. On this subject he said: "This expectation is fully justified by the

2 Buch.**Cook v. Weigley.**

terms of the compact. Article 1, in clear and explicit language, fixed the boundary line between the states as the middle of the Hudson river and the bay of New York. This disposed of the question of territorial limits, and had this been the only matter submitted to the commissioners would have exhausted their authority in the premises. They were; however, empowered to deal also with jurisdiction. Hence the qualification with which article 1 concluded—‘except as hereinafter otherwise particularly mentioned.’ To fulfill the conditions of this clause, the matters to be particularly mentioned must be ‘otherwise’—that is, must alter or modify what has gone before, and secondly, must be capable of exception—that is, of subtraction from it, hence must be less than what had preceded. Articles 2 and 3 fulfill with precision each of these conditions, and from their position and context admit of no other rational interpretation than that they are the excepted matters to be particularly mentioned, by which the otherwise unqualified concession of territorial limits was to be modified and abridged. This was affected in article 2 by providing that New York should retain its jurisdiction over certain islands lying in the waters mentioned in article 1, while article 3 continued the subtracting process by stipulating that New York should enjoy exclusive jurisdiction over all the waters included in the territorial limits of New Jersey up to low-water mark on the New Jersey shore.” It is difficult to conceive why, if the ceding of exclusive jurisdiction over waters included within the territorial limits ceded confers only an extraterritorial jurisdiction, and does not destroy such governmental powers as sovereignty implies, why the retention of exclusive jurisdiction over a part of the land declared to be within the limits of the State of New Jersey should have any greater force. By article 2 of the treaty the lands in question are declared to be within the boundary of the State of New Jersey, and subject to the sovereignty of that state, encumbered, however, with the right of New York to exercise jurisdiction over it. This, in my opinion, does not change the territorial location of the land, for the reservation of jurisdiction thereover did not have the effect of retaining the land as a part of the territory of the State of New York, and the jurisdiction which the State of New York

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retained, and may exercise, is no greater than the "exclusive jurisdiction" granted to New York over all the waters of the bay of New York, and does not have the effect, here contended for, of depriving this court of the jurisdiction necessary to determine the legal status of these islands to the same extent that it may do with regard to all other lands within its boundaries.

In the extremely able and interesting opinion read by Mr. Justice Garrison in *Central Railroad Co. v. Jersey City*, *supra*, he sums up the conclusions reached by the courts of New York on this question in the following words: "Indubitably, therefore, the State of New York, through its highest judicial tribunal, has expressly disowned any interpretation of the compact in question by which the sovereignty of New Jersey over the territorial limits granted by the compact of 1833 is to be in anywise impugned."

The conclusion which I have reached is that the demurreur should be sustained, with costs.

EDWARD R. THOMAS

v.

INTERNATIONAL SILVER COMPANY et al.

[Decided January 11th, 1907.]

1. A corporation, by pledging its own stock as collateral to another corporation, cannot empower the pledgee corporation to exercise a power or incident of ownership which the real owner does not possess.

2. Evidence examined, and *held* to show a pledging of stock, not made in good faith for the purpose of affording additional security for loans, but for the purpose of placing the stock in the hands of those friendly to the existing management, in order that it might be voted on to retain them in power, and thus avoid the letter and spirit of the prohibition contained in the thirty-eighth section of the General Corporation act of this state. *P. L. 1896 p. 277.*

2 Buck.Thomas v. International Silver Co.

Mr. Robert H. McCarter, attorney-general, and *Mr. Otto Hess* (of the New York bar), for the complainant.

Mr. John W. Griggs and *Mr. Graham Sumner* (of the New York bar), for the defendants.

BERGEN, V. C.

The United States Silver Company is the owner of ninety-three thousand shares of the common and five thousand shares of the preferred stock of the International Silver Company, and the latter company owns all of the capital stock of the United States Silver Company, and controls, through such ownership, its management. The direct result intended by this arrangement is the voting of the shares of the International company, registered in the name of the United States company by the officers of the International company for such persons as they may desire to continue in, or appoint to, the management of their company, the directors of the United States company being also directors of the International company. The testimony shows that all of the capital stock of the United States Silver Company was purchased by, and now belongs to, the International company, although some of the shares stand in the names of the officers of the International company for the purpose of qualifying them as directors. That the International company is the real owner of the stock, and that its officers should not be allowed to exercise the voting power usually incident to stock ownership, either directly as owners, or indirectly through its control of the United States company, seems to me very clear, and their right to vote the stock was not seriously pressed on behalf of the defendants on the argument. No substantial change in the situation upon this branch of the case has occurred since the matter was passed upon by the court of errors and appeals in *O'Connor v. International Silver Co.*, 68 N. J. Eq. (2 Robb.) 680, and the argument for the defendants was based upon the assumption that, in equity, the International company was the owner of the stock. The present controversy arises over the right claimed by certain pledgees, to whom the stock has been assigned in pledge as collateral for the

debts of the International company, to vote at the next annual meeting of that company for the election of officers. The evidence shows that just previous to the filing of the bill of complaint by O'Connor, the stock owned by the United States company was transferred to several banks and trust companies as collateral security, in some cases for loans already made to, and in others for loans expected by, the International company. The present proceeding looks to an injunction preventing the pledgees from voting on the hypothecated stock held by them respectively, which in each case was regularly transferred to them on the books of the International company, the transfer expressly empowering each pledgee to vote thereon.

The first question presented is, can a corporation, by pledging its own stock as collateral to another corporation, empower the pledgee corporation to exercise a power or incident of ownership which the real owner does not possess? Section 38 of the Corporation act of this state declares "shares of stock of a corporation belonging to said corporation shall not be voted on directly or indirectly," and if by pledging stock as collateral security the directors of a corporation can endow the stock with a virtue it does not possess in the hands of the real owner, and the disqualification of the pledgor to vote the stock does not extend to the pledgee, it would appear that in every case where a corporation is the owner of its own stock a ready method is provided by which the officers of a corporation desiring to perpetuate themselves in office can bring about that result, and it should not be allowed unless the law plainly requires it, because it is in effect an indirect way of voting the stock. According to section 37 of the same act the pledgor may represent his stock at all meetings and vote thereon as a stockholder, "unless in the transfer to the pledgee on the books of the company he shall have expressly empowered the pledgee to vote thereon." The right to vote on stock pledged as collateral remains, under our law, with the pledgor, unless by his act he shall empower the pledgee to vote thereon. The transaction is a contract between the parties, settling as between them who shall exercise the voting power incident to the ownership of the stock. It is in its nature a proxy given by the pledgor to the pledgee to repre-

*2 Buch.**Thomas v. International Silver Co.*

sent the voting power of the owner, and may be revoked by the pledgor at any time by redeeming his pledge. That the directors may sell the stock and thereby restore its voting power, does not meet the question, for an absolute sale of the stock deprives the pledgor of any right in, or control over, the stock, it is not subject to redemption, and the real owner in such case takes the voting power, not by way of contract or proxy, but as a right incident to his ownership. To interpret our statute otherwise would open the door to a constant evasion of the law which prohibits directors from voting, directly or indirectly, on the stock of their own company, because temporary loans could always be made by them just prior to the annual election, and the stock pledged with a voting power to persons known by the directors to be friendly to their aspirations.

My conclusion is, that under our law whenever the owner of stock is disqualified to vote it, that disqualification is not removed by simply hypothecating the stock as collateral for a loan, and that the right which the law gives to the pledgor to empower "the pledgee to vote thereon" is limited to such pledgors as are themselves possessed of the right to vote on the stock which they own, and that the pledgees in this case hold the stock of the International company subject to the same disqualification, so far as the power to vote thereon is concerned, as that which the statute imposes on the pledgor.

The second question presented is whether the pledging of this stock was made in good faith for the purpose of affording additional security for loans made to the International company, or for the purpose of placing the stock in the hands of those friendly to the existing management in order that it might be voted to retain them in power, and thus avoid the letter and spirit of the prohibition contained in our law. The evidence convinces me that the directors pledged this stock, not as security, but simply for the purpose of restoring to it a voting power that the pledgees might exercise in their interest. It was a palpable attempt to evade the law and to secure the benefit of the votes which the stock would represent in the hands of a duly-qualified owner. This stock had only a nominal value, and was intrinsically worthless as security independent of the fact

that it could have no possible value until the very debts it was given to secure had been liquidated, for all of the assets of the company which supported the stock would be first liable for the debts of the company, and if the assets would not so far extend then the stock would be absolutely worthless either to pledgor or pledgee.

We do not have to look very far to ascertain the motive of these directors. In March, 1904, a circular letter was mailed to all of the stockholders of the International company by three of its stockholders who claimed to be the largest individual holders of the stock of the International company, one of them being the complainant in this cause, requesting the attendance of stockholders at the next annual meeting, for the purpose of securing representation on the board of directors for such stockholders as were not either officers or managers of the company. A careful reading of the letter shows that there is nothing improper or unfair in its statements, nor does it indicate any motive other than a desire to bring about what they esteemed to be a more economical management of the company. Whether they were justified in their claim that the business could be conducted with greater economy than was then being exercised, I am not called upon to determine, but the right of stockholders largely interested, to appeal to their fellow-members of the company to attend the annual meeting and urge reforms and retrenchments in the management of the company, or if unable to attend the meeting to send a proxy that others might represent them, is not an act which the officers of a well-managed company ought to complain of or discountenance, and I cannot find in it any cause for the alarm which Mr. Rockwell, the president of the First National Bank of Meriden, Connecticut, said induced him to start a concerted movement by the banks to secure from the company a pledge of its own stock as collateral for its debts, existent and anticipated. It is not denied that up to this time the International company kept large balances in the institution to which the stock was afterwards pledged, and that its credit was sufficient for it to procure all necessary funds to carry on its business without giving any collateral, and as an effort by stockholders to reduce the expense of conducting the business

*2 Buch.**Thomas v. International Silver Co.*

was not likely to injuriously affect its credit, I do not deem it necessary to analyze in detail the large amount of testimony taken in this cause. It is sufficient to say that it convinces me that the movement started by Mr. Rockwell, which resulted in the pledging of the stock in question, had but one real purpose, and that was to have the stock transferred with a voting power, to friendly parties who would exercise it in the interest of the directors of the International company, and thereby continue them in its management, and is but a thinly disguised scheme to have stock owned by the corporation voted upon indirectly. The evidence shows that Mr. Rockwell was a very intimate friend of Mr. Dodd, the president of the International company, and a brother of the secretary of that company; that upon the receipt of the circular letter to which I have referred, he went to New York City from Meriden, where the general office of the International company is located, and visited the officers of the American National Exchange Bank, the National City Bank, both of New York City, and of the Hackensack Trust Company, and arranged that those institutions should make a demand upon the International company for a pledge of its stock, being the banks and trust company which he knew were at times loaners of money to the International company, and told them that the bank he represented, as well as the Home National Bank, of Meriden, intended to demand a pledge of the stock of the International company, and suggested that they pursue the same course, in order, as he said, that they might be represented at the stockholders' meetings with a right to vote on the stock to be transferred to them. At the time of his visit to New York the American Exchange Bank had no claim against the International company, while the company then had on deposit with that bank a large balance, nor was there any debt owing at that time to the Hackensack Trust Company, but, on the contrary, the trust company was indebted to the International company for a considerable deposit balance. It is true that the International company was then a borrower from the National City Bank, and also from the two banks in Meriden, for which accommodation, however, the International company carried large balances. The transfer of this stock took place

about the 17th of March, 1904, at which time the indebtedness of the company to the National City Bank was \$50,000, while its credit balance there was nearly \$46,000; its indebtedness to the Home National Bank was \$40,000, while its credit balance was nearly \$63,000; its indebtedness to the First National Bank being \$20,000, while its credit balance was \$15,000. Under these circumstances, coupled with the fact that the International company had, up to that time, been considered by all these financial institutions as solvent and entitled to a very liberal credit, at the same time keeping generous balances with each of them, and no change in their financial condition being asserted, it is impossible to come to the conclusion that these institutions were at all alarmed about the financial condition of the company, and had no real desire to have the stock of the International company pledged as security, beyond a willingness to aid the persons in control of a profitable customer to continue in power. The stock was taken, not because it was a collateral of any value or as security, but in order, as it was expected, to restore a suspended voting power to be exercised on behalf of the officers of the company making the pledge. That the officers, representing the pledgor and pledgee corporations, testify that no bargain was made regarding the persons for whom the votes should be cast, and that the power of the pledgee to vote as it pleased was not restricted by any agreement, I am justified in inferring from the evidence that there was a well-founded expectation on the part of the officers of the International company that the pledgee would vote the stock in their interest, and I have, no doubt, from the various efforts made by the directors of the International company, as disclosed in this case, to control the voting power of this stock, that if they were at all doubtful as to the intention of either of these pledgees, the pledge would have been promptly redeemed and hypothecated with a more steadfast friend.

On this branch of the case my conclusion is, that these pledgees are not *bona fide* holders of this stock as collateral for loans made by them, but took it for the sole purpose of aiding in the indirect voting of the stock of a corporation owned by the corporation itself, and that the pledgees hold this stock in equity,

2 Buch.Sharp v. Sharp.

in trust for the International company, and without any real interest therein, and that to permit them to vote it would effect the very evil which the law intended to prohibit when it forbade the voting by the corporation of its own stock either directly or indirectly.

I will advise an injunction preventing the defendant pledgees from voting on the stock held in pledge.

MARY SHARP

v.

WILLIAM H. SHARP.

[Decided October 28th, 1906.]

1. Where the only evidence of the desertion of petitioner's husband, which was alleged to have occurred in St. Louis, Missouri, in 1892, was that of petitioner herself, and the only other testimony in the case was given by persons residing in New Jersey, that the husband had not visited his wife since her return to her father's house in 1895, there was not sufficient corroboration as to the fact of desertion to entitle petitioner to a divorce.

2. Where, in a suit for divorce for desertion, the original separation was not shown to have been a desertion, evidence proving its continuance was insufficient to entitle the wife to a divorce.

On petition for divorce.

Mr. Blanchard H. White, for the petitioner.

GARRISON, V. C.

This is an undefended divorce case. The allegation is desertion. The master reported in favor of a decree for the petitioner. I cannot concur therein, and I find that the petitioner has not made out a case entitling her to a decree.

Briefly stated, the facts are that she was married in 1883, and went shortly thereafter to live with her husband in St. Louis,

Missouri. He was a machinist, employed by a firm in that city. They lived there for nine years, having two children born to them. They lived in entire amity. She testified that on the 15th day of March, 1892, her husband arose, breakfasted, and went to his work as usual, kissing her and the children good-bye; that later in the morning he came back and told her that he was going to repair some machinery in a near-by factory, and would be through about dinner time, and would be home for dinner; that she ascertained that he did go back to the shop of his employers and left there to come home to his dinner; that he did not come home, and that she has never seen him since, and has never heard from or of him since. She testifies that she made inquiries about him, but could learn nothing; that she consulted the police, requesting them to institute a search, and also advertised his disappearance, asking for information; that she inserted such advertisements for over two weeks, but never learned anything concerning him; that she continued to live in St. Louis for about three years, and then returned to her father's house at Retreat, in Burlington county, in this state, in the year 1895, and has since continued to live there. She testifies that she cannot conceive of any reason why her husband left her, nor of any reason why he acted as he did, and why he did not return.

The only other testimony in the case is given by persons who live in Burlington county, New Jersey, and who testify that they know that the husband has not visited the wife since her return to her father's house in 1895.

I do not see how a divorce can be granted to the petitioner in this suit without violating the inflexible rule that the testimony of the party seeking the divorce must be corroborated as to the fact of desertion, and that testimony proving the continuance of the separation is not sufficient unless it shows that the original separation was a desertion. *Corder v. Corder*, 59 Atl. Rep. 309 (Vice-Chancellor Emery, 1904).

This disposes of the case without the necessity of considering the questions which would arise if the petitioner's evidence was corroborated as to the facts attending the origin of the separation.

I will advise a decree dismissing the petition.

2 Buch.Lignot v. Jaekle.

CATHERINE W. LIGNOT et al., executors, &c.,

v.

J. EDWARD JAEKLE.

[Decided November 18th, 1906.]

1. On a bill by grantors against grantees in a deed to enforce a restriction contained in the deed against the construction of a flat or tenement-house, evidence considered, and *held* to show no waiver of the restriction.

2. Any building consisting of more than one story, in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes, is a "flat," within the meaning of a restriction in a deed that the grantee shall not permit to be erected on the premises any building which shall be used or occupied as a flat.

3. If what is known as a "flat" becomes an "apartment-house" when higher rental is charged, the payment of a rental of from \$35 to \$40 per month does not turn what is otherwise a "flat" into an "apartment," so as to take it out of a building restriction binding the grantee not to erect a flat on the premises.

4. Where a grantor, retaining a portion of the land, enters into a written understanding with the grantee restricting the enjoyment in order to benefit the portion retained, and the restriction is reasonable, it will be enforced in equity against the grantee.

5. If a grantee claims that his deliberate disregard of a building restriction written in a grant does not damage the grantor, he must make his position clear beyond the possibility of doubt.

6. In an action by grantors against grantees to enforce a building restriction contained in a deed, evidence *held* to show that complainants were not guilty of laches.

On pleadings and proofs.*Messrs. Hudspeth & Carey*, for the complainants.*Mr. I. Faerber Goldenhorn*, for the defendant.

GARRISON, V. C.

This is a bill filed by the executors of Peter Joseph Jules Lignot against J. Edward Jaekle to enforce against the latter a

restriction contained in a deed from the complainants to the defendant.

The complainants are executors and trustees under the will of Peter Joseph Jules Lignot, with power of disposition of his property.

Peter Joseph Jules Lignot died in 1887 seized of a large tract of land in the Greenville section of Jersey City. At the time of his death this property consisted of a mansion-house or home-
stead and the usual buildings in connection with such, the rest of the land being orchard or meadow land. The complainants have retained the mansion-house and its appurtenances, and continue to live therein.

In 1888 the executors had the rest of the property surveyed, laid out in building lots, and cut two courts through from Linden avenue. The property is bounded by Linden avenue on the west, the property late of Lembeck on the east, Ocean avenue on the south, and Garfield avenue on the north. The property on Ocean avenue was sold for any purpose for which such land might be used, so that stores, flat buildings and other business structures might be there located. The conveyances so far made of the rest of the property contain practically the restriction contained in the Jaekle deed. I say "practically," because, from an inspection of certain of the deeds put in evidence, it appears that the cost of the houses to be put upon the property varied, those on Linden avenue to be of a higher cost than those on the courts. But each were restricted, as to the character of the building, as in the Jaekle deed. That restriction, so far as we are concerned with it, is contained in the following language:

"That the said party of the second part [which is the defendant, J. Edward Jaekle], his heirs or assigns, shall not at any time hereafter erect, or cause, procure, permit or suffer to be erected, on said premises, or any part thereof * * * any building that shall be used or occupied as a flat or tenement-house."

The deed to Jaekle is dated January 9th, 1903. The deed was delivered and the consideration paid at the home of the complainants on the day that the deed was acknowledged, January 14th, 1903. There were present at that time Dr. Lignot, the

2 Buck.Lignot v. Jaekle.

complainant; his mother, Mrs. Catherine W. Lignot, the other complainant; a brother of Dr. Lignot, named Paul; C. W. Wenner, the master; J. Edward Jaekle, the defendant, and his attorney, I. F. Goldenhorn. The two latter witnesses testify that at that time Mr. Goldenhorn, after the deed had been delivered, in the course of a general conversation, stated that it was the intention of Mr. Jaekle to erect a two-family house upon the property, and that he (Jaekle) and his father intended to live in the same. They testify that Mrs. Lignot responded by saying that she had no objection to them as neighbors. This is the consent which the defendants allege was given at that time to the defendant's erection of the building subsequently planned and erected.

This conversation is specifically and *in toto* denied by the other four parties present.

In February the plans for the structure were exhibited by the defendant to Dr. Lignot, and some negotiations or conversations concerning the matter of erecting that kind of a house upon this property were had between Mr. Hudspeth, the attorney of the Lignots, and Mr. Goldenhorn, the attorney of the defendant.

On the 1st of March, 1906, Mr. Goldenhorn addressed a letter to Mrs. Lignot, in which he states that his client is about to erect a two-family apartment-house upon the lots, and that if the Lignots have any objection they should at once take proceedings to make the same effective, or the defendant will assume that they are willing and consent to the erection of such a house upon the lots. This letter was mailed on Saturday, the 3d day of March, and was presumably received by Mrs. Lignot on Monday, the 5th, and was then taken by Dr. Lignot to Mr. Hudspeth, who, on the 10th of March, responds to the same. The reply informs Mr. Goldenhorn that the Lignots do not consent; that they hold that such a structure violates the covenant, and that, if persisted in, suit for damages, or other proper proceedings, will be taken to protect the interests of the grantors.

Thereafter there were conversations at various times between the attorneys of the parties, the general purpose of each of the attorneys being to arrive at some sort of an understanding between the clients so that Jaekle could proceed with the erection

without interference by the grantors. It was the general understanding between them that Jaekle should endeavor to get the consents of the other grantees of the complainants whose properties were adjacent to Jaekle, and that Hudspeth would then endeavor to get the consent of the Lignots, the idea being that if the other grantees acquiesced the Lignots would not feel under pressure or obligation to continue their objection.

Since all the lots on Linden avenue were subject to this same restriction it was assumed by the parties that the other grantees of Linden avenue lots had some rights with respect to the character of the building to be placed on any lot.

The defendant testifies that some time in the early part of July of 1906 he met Dr. Lignot on the street and informed him that he was about to erect the house, and that Dr. Lignot stated he had no objections. Dr. Lignot denies this specifically.

In the latter part of July (probably upon the last day thereof) the defendant broke ground and proceeded with his excavation.

Mr. Hudspeth, shortly after this, left for his summer vacation, leaving his managing clerk in charge of this matter, and at an interview held in the early part of August between Mr. Goldenhorn and the managing clerk of Mr. Hudspeth, it was the understanding that Mr. Jaekle should not erect his house without obtaining the consent of the Lignots, and that he should, in any event, await the return of Mr. Carey, a partner of Mr. Hudspeth, who was to return before the latter.

Upon Mr. Carey's return further interviews were held along the same lines. On the 24th of August, 1906, Mr. Goldenhorn and the defendant visited Mr. Carey, having with them the plans of the building. They spoke of the consents of the adjacent owners that they had, or assumed that they had, and wanted Mr. Carey to inspect the plans so as to see that the building would not be a detriment to the neighborhood. Mr. Carey stated that he was not interested in the plans, that his sole interest was to protect his clients, and that he would like to see the matter amicably arranged for every reason, and that if the defendant would get the consent of the complainants there would be no further difficulty, and he suggested that they go to the complainants and endeavor to obtain their consent.

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On the night of that day the defendant and Mr. Goldenhorn went to the residence of the complainants and ascertained that the doctor was not at home, and that Mrs. Lignot was not able to see them, whereupon they delivered their message and plans to a daughter of Mrs. Lignot, who promised to let them hear from her mother in a few days.

At the interview with Carey last mentioned it was the understanding that the parties were to await the return of Mr. Hudspeth if they did not obtain the consent of the grantors. Mr. Hudspeth returned some time after Labor day (September 3d, 1906), and found that the framework of this building was up, and thereupon filed the bill in this suit on the 17th of September, 1906.

I am entirely convinced from all of the testimony that there was no positive, direct agreement, consent or acquiescence on the part of the grantors to permit the grantee to erect the building in question. While there were a great many interviews between the parties in interest, I think it entirely clear, and that the conduct of the defendant demonstrates, that he never secured from the complainants any direct permission, consent or acquiescence to the erection. The impression left upon my mind by the testimony is that the complainants did not themselves have any violent or obstinate objection to the erection of the building in question. They feared that if this building, which they deemed a "flat," was erected, other grantees subject to a similar restriction might erect cheaper houses of the same character, to the detriment of the neighborhood and the injury of the property in the same plot still retained by the complainants. The building that the defendant proposed to erect was to be of good architecture, fine appearing and costly, being much more costly than almost any other house in the neighborhood. I think that the complainants feared also that other grantees whose deeds contained similar restrictions, and who had erected private dwelling-houses there, would come upon them if they were to consent to the erection of the Jaekle building, and that therefore they and their counsel constantly stated to the defendant that they had no objection themselves if the consent of the other grantees could be obtained, but that in default of such consent being obtained,

they maintained, in its rigidity, all of their rights, and did object. This, I think, explains the apparent contradiction between the parties, and shows that it is not a real contradiction.

The complainants are truthful and correct in their testimony that they did not consent to the erection of this building, did not acquiesce in it, and did always object to it, whereas the defendant is also correct in saying that they stated that they had no objection to it, their objections being not personal, but based upon the failure of the defendant to obtain the consent of the other grantees.

That brings us to the construction of the language of the covenant in relation to the facts.

The language previously quoted is that the grantee is not to erect "a building to be used or occupied as a flat or tenement-house." The house which the defendant has planned and partially erected is a two-story and attic house, which is to cost about \$10,000, with an entrance in front, from which access is obtained both to the first and second floors by separate hallways. Upon the first floor is a complete housekeeping suite, and a similar one upon the second floor.

The exact question to be determined is whether the building in question is one to be used or occupied as a "flat or tenement-house."

The complainants have not argued that the house in question is a "tenement-house" within the meaning of the restriction. It is, of course, elemental that the word "tenement," etymologically speaking, would cover any sort of a house which was of a permanent nature and could be holden, but by the use of the term the parties undoubtedly meant a community-house of a certain kind. I think it clear that those words, as used here, meant a community-house occupied by persons of small means, the distinguishing characteristics of which are the use in common of certain facilities by people crowded into insufficient space and deprived of many of the essentials of privacy, decency and health. This is the meaning given to the phrase in *Kitching v. Brown*, 180 N. Y. 414. In that case there was a very strong dissent, however, based upon the principle that the court could

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not, and should not, distinguish between different kinds of tenement or community-houses.

A "flat," etymologically, is a floor in a building. Later the use of the word became restricted to a floor completely equipped for housekeeping purposes. A building containing such floors, so equipped, each of which is called a "flat," is itself termed a "flat," but, more properly speaking, should be termed a "flat-house."

The question to be decided in this case is, How many such floors must a building have to come within the term of "flat" or "flat-house?"

It should first be observed that, in my view, the floor completely equipped for housekeeping purposes must be in a building in which there are other floors, because I do not think that a bungalow or ranch building all on one floor has ever properly been termed a "flat," or the building a "flat-house." In this country flats or flat-houses have usually been built of many stories, upon each floor of which buildings there has been one or more suites of rooms fitted up for housekeeping purposes. The query is, How many stories, so equipped, must there be to constitute the building a "flat" or "flat-house?"

In default of any arbitrary definition established either by positive enactment or by decision, I think it must be held that any building consisting of more than one story, in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes, is a "flat" or "flat-house." I do not see how the court can apply any other test that is reasonable. A floor equipped for separate housekeeping is a "flat." A building containing such "flats" is a "flat-house." If two such floors do not so constitute it, how many would? There is no answer of which I am aware.

The fact that it has not been customary to erect "flat-houses" of only two stories cannot alter the conclusion.

I do not see upon what one could base a finding that a "flat-house" must consist of more than two stories.

In *Skillman v. Smatheurst*, 57 N. J. Eq. (12 Dick.) 1 (at p. 5), Chancellor McGill said of a "flat" or "flat-house:" "It is really a community-house, designed for the accommodation of

more than an individual and his household." In that case the building consisted of three stories, upon each floor of which building there were apartments equipped for housekeeping, and the court designated it as a "flat" or "flat-house."

The defendant contends that this restriction does not limit the character of the building to a private dwelling, and that it does not forbid the erection of what is termed a "two-family house;" that is, a house so built that two families may live therein, side by side, separated by a dividing wall, and therefore this house in question, which is built for two families to reside one above the other, is also permitted. This contention seems to me to be without merit. If I am correct in my holding that the house in question is a "flat" or "flat-house," then it is prohibited by the restriction, and the fact that some other house answering the same purpose could be built without violating the restriction is immaterial and irrelevant. It only serves to show how readily the defendant could accomplish his purpose without violating the covenant.

Nor is the defendant helped by terming this building an "apartment-house," and claiming that then it is not within the restriction. An "apartment-house" is either a building otherwise termed a "flat" or "flat-house," or it is a building divided into separate suites of rooms intended for residence, but commonly without facilities for cooking, &c. *Kitching v. Brown, supra.*

The building in question does not come within the latter part of the above definition, because each suite in it is to have separate facilities for cooking.

The court in the case just cited finds that the terms "flat-house" or "apartment-house" are used interchangeably, and mean the same thing, the only difference being that when the rent is cheap the building is customarily referred to as a "flat" or "flat-house," whereas when the rent is higher, the politer term is "apartment" or "apartment-house." There is no distinction with respect to the nature of the building or its use.

Where the interdicted thing is indicated clearly, as it is in the case at bar, mere nomenclature will not be allowed to prevail in deciding the rights of the parties. The thing intended to be

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prohibited by this covenant, which was drafted about 1888, was the erection upon this property of community-houses termed "tenement-houses" or "flat-houses." The fact that the latter character of house as it became more costly has a different name, used interchangeably with its old name, cannot vary or alter the rights of the parties. The only distinction suggested by anyone between an "apartment" and a "flat" is the amount of rent. Highly ornate private dwellings are often termed "mansions," but it certainly could not be successfully contended that if land were restricted so that it might not have erected on it a private dwelling one could erect a costly dwelling thereon and, by calling it a "mansion," prevent the enforcement of the restriction.

Furthermore, I do not find that the amount of rent to be charged for these suites (namely, \$35 to \$40 per month) brings the same within the definition contended for by the defendant. His sole contention on this head is that what is otherwise a "flat-house" becomes an "apartment-house" when a certain amount of rent is charged. It is admitted that there is no standard with respect to what amount of rent converts a "flat" into an "apartment," but fairness to the defendant does not require from him an absolute definition, provided there is any reasonable method of ascertaining the limits. Undoubtedly, if the distinction be a true one, there are means and extremes about which there could be no question. A suite renting for \$10 a month would then undoubtedly be a "flat," whereas one renting at \$1,000 a month would undoubtedly be an "apartment." Granting, therefore, for the sake of the argument, that there is this distinction, and that it is a real one, I do not find that \$35 to \$40 a month rent turns what is otherwise a "flat" into an "apartment."

It is the settled law of this state that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee which restricts the enjoyment of the portion of the land conveyed in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, such restriction will be enforced in equity against the grantee at the instance of the grantor. *Hayes v. Waverly & P. R. Co.*, 51 N. J. Eq. (6 Dick.) 345 (at p. 348) (*Chancellor McGill*, 1898); *Cornish v. Weiss-*

man, 56 N. J. Eq. (11 Dick.) 610 (at p. 613) (*Vice-Chancellor Emery*, 1898); *Roberts v. Scull*, 58 N. J. Eq. (13 Dick.) 396 (*Vice-Chancellor Grey*, 1899).

And if the defendants rely upon an allegation that the complainants will not be damaged by the defendant's deliberate disregard of the restriction, they must make it clear beyond the possibility of doubt that the complainants cannot be damaged. *Cornish v. Weissman*, *supra*; *Morrow v. Hasselman*, 69 N. J. Eq. (3 Robb.) 612 (*Vice-Chancellor Emery*, 1905).

There was no proof in this case by the defendant, and nothing from which he could successfully argue, that the complainants suffered no damage by his disregarding the restriction and building a "flat" upon the lot purchased from the complainants.

The complainants in the case in hand do retain a portion of the land out of which this grant was made. There is an express written covenant which does benefit the portion of the land still retained, and the restriction is reasonable and consonant with public policy. The restriction, therefore, will be enforced at the instance of the grantors against the grantee unless the former have in some way forfeited their right to insist on enforcement in equity.

They undoubtedly may forfeit such right by consent.

They may also lose it by abandonment or waiver.

If there is a general scheme embracing a large number of separate lots, and they permit others to violate the restriction, they may be held to have waived or abandoned it so as to lose their right to enforce it against a particular defendant. This latter, however, applies more strongly, if not solely, to cases where the right is equitable and not legal, and is most often applicable in cases where either the grantor seeks to enforce the right against someone other than his grantee, or where some other person than the grantor seeks to enforce the restriction.

Lastly, the right may be lost by laches.

It is contended by the defendant in the case at bar that the complainants consented or acquiesced in the erection of the building in question. I have found as a fact that this is not so.

It is next contended that by abandonment or waiver they have forfeited their right to enforce the restriction against the de-

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feudant, because upon the tract of land in question there are two other houses, referred to in the testimony as "Kelsey's house" and "Thorn's house," each of which is occupied by two families. The defendant urges that the existence of these two houses, so equipped, shows an abandonment or waiver by the grantors of their rights. As has been before suggested, such a contention has great weight where someone other than the grantor is seeking to enforce a restriction, but is not so weighty when he is the actor. *Gamm v. Renner*, 59 N. J. Eq. (14 Dick.) 307 (at p. 309) (*Vice-Chancellor Pitney*, 1900); reversed, but not on this point, *sub nom.*, *Walker v. Renner*, 60 N. J. Eq. (15 Dick.) 493.

The basis of the principle is that where the scheme has been departed from by acquiescence or consent it is inequitable to enforce it thereafter. But it seems to me that it is elemental that the departure, if one exists, must have been acquiesced in or permitted, and it has been held that it is not every permitted infraction which will preclude the enforcement. *Hemsley v. Marlborough Hotel Co.*, 62 N. J. Eq. (17 Dick.) 164 (at p. 172) (*Vice-Chancellor Reed*, 1901); affirmed, 63 N. J. Eq. (18 Dick.) 804.

The proofs show that on one of the courts there were erected two houses which exteriorly indicated private dwellings. One was referred to as "Kelsey's house," and the other as "Thorn's house," named from the persons who owned them. There was nothing in the appearance of either house to indicate that it was not a private dwelling-house. There is no evidence to overcome the denial on the part of the complainants that they knew that either of these two houses was fitted up for the use of two families living separately, one above the other. There is testimony that the Thorns informed the complainants that they intended to have two families in their house, but there is nothing to show that they informed the complainants that they intended to have these families dwelling in flats or floors separately fitted up for housekeeping, and this is the gist of the matter. All parties seem to agree that this restriction does not prohibit that which is termed a "two-family house," a house in which the families live under the same roof, side by side, separated by a dividing wall, or share a dwelling-house in common.

In default, therefore, of proof that there was any knowledge on the part of the complainants, or any implication of knowledge, I find that there was no permitted violation of this covenant, even if the law is that by permitting the violation of the covenant by one grantee the grantor loses the right to enforce it against another grantee.

Whether this is the law or not I do not decide, since it is not necessary.

The defendant's final insistment is that the complainants have forfeited the right to insist upon enforcement by reason of their laches. Whether this is so or not depends upon the proven facts. The proofs show that the digging of the cellar began on the 31st of July, 1906. Prior to that time, as I have stated in a previous part of this opinion, there had been numerous interviews between the parties or their counsel in which the question discussed was the erection of this building on this tract. The defendant had sought permission from the grantors, and had, as I find, failed to obtain it, and he thereafter continued to seek permission. The grantors had placed the matter in the hands of their counsel, Hudspeth & Carey. Mr. Hudspeth, of that firm, went away on his vacation just about the time that the excavation was begun, and upon his managing clerk's learning that the excavation had begun an interview was had between the said managing clerk and the attorney of the defendant, Mr. Goldenhorn, at which an understanding was reached that nothing in the way of superstructure should be proceeded with until the return of Mr. Carey, the partner of Mr. Hudspeth, who was expected home before Mr. Hudspeth. Upon Carey's return he was advised by his client that they were proceeding with the superstructure, and he got into communication with Mr. Goldenhorn and the defendant. It was then understood that they would stop any further work upon the building and not proceed until they had obtained the consent of the grantors, the complainants, and in default of obtaining such consent, would not proceed until Mr. Hudspeth returned. They did, however, proceed within a week, and Mr. Carey called Mr. Goldenhorn's attention to this, and that it was a violation of their understanding, which Mr. Goldenhorn admitted, and thereupon Mr. Goldenhorn again agreed that they

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would not go on with the work without obtaining the permission of the grantors, and would, if such permission was not forthcoming, await the return of Mr. Hudspeth. Immediately after this interview the defendant and his attorney visited the Lignots to obtain consent. Work was continued upon the building, and when Mr. Hudspeth returned about the 10th of September the building was enclosed. Whether any work was done on the interior is uncertain. Mr. Hudspeth then caused the bill in this case to be prepared and filed.

I do not see how it can be said that the complainants are in laches. From the inception of the controversy they always maintained that the restriction forbade the erection of the building in question, and that they should insist upon enforcing the restriction. The defendant always sought consent and permission to erect the building, notwithstanding the restriction, and the defendant's counsel always advised his client that he had the right to erect the building without permission or consent; in other words, that the restriction did not forbid the erection of this kind of building. I think it clear that the defendant acted upon this view of the law.

The complainants, by promptly consulting counsel and taking the counsel's advice; by informing counsel of every move that was made upon the ground, which they appear to have done, certainly used all the vigilance that they could. Counsel for the complainants was in constant communication with counsel for the defendant, and rigidly insisted upon the rights of the complainants. If the defendant went on erecting the building in the face of this attitude of the complainants, and in spite of the agreements that he would not so go on, it seems to me that he is utterly without any ground for maintaining that the complainants were in laches. He did not erect the building in any doubt as to the complainants' attitude, or because the complainants did not promptly object, but he did whatever work was done with absolute knowledge that the complainants objected, and I find that he did it despite the agreements with the attorneys of the complainants that he would not do it. He therefore acted at his peril. *Kitching v. Brown, supra* (at pp. 418, 419).

I do not find, therefore, that the complainants are in laches.

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My conclusion is that the complainants are entitled to an injunction to enforce the restriction.

Since, however, the building itself—that is to say, the exterior thereof—does not violate the covenant, there is no necessity for any injunction requiring the taking down of the building. The thing prohibited is a building to be used or occupied as a flat, and the injunction, therefore, will prohibit the use of this building in violation of the restriction.

MOSES MIZOROWSKY

v.

RACHEL MIZOROWSKY.

[Decided December 17th, 1906.]

1. Where a husband, after removing to New Jersey from Russia, wrote to his wife in March, 1901, to get ready to come over, and she replied that she did not then want to come, and requested him to send her money, which he did, and continued to do, such fact was insufficient to establish the wife's desertion as of the date of her refusal.

2. Where a petition for divorce for desertion was filed in February, 1904, and the only desertion proved was in June, 1902, and in September, 1903, it was insufficient, being less than two years prior to the commencement of the suit.

On petition for divorce.

Mr. Frederick A. Pope, for the petitioner.

GARRISON, V. C.

This is an undefended divorce suit. The petition is filed for an absolute divorce based upon the charge of desertion. The petition charges that the desertion took place in the month of June, 1900, at Odessa, Russia, when the defendant informed the

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petitioner that she was tired of him, and went to live with her mother in that city.

The proofs show that the parties were married at Odessa in 1897 and lived together until December, 1900, that they had two children. The petitioner testifies that his wife was dissatisfied with the small earnings which he could make in his trade of silversmith in Russia and advised his coming to this country; that he landed in this country in January of 1901; that previous to leaving Russia his relations with his wife had been amicable, and that they were living together up to the time he left; that two days after he landed in New York he came to Jersey City and has since lived there; that he left with his wife the sum of \$20; that after he obtained a position here (which he did almost immediately) he sent his wife every month from \$15 to \$25, and continued to do this until September, 1903. He testifies that in March of 1901 he wrote to her to get ready to come over, and that she replied that she did not then want to come, and requested him to send her some money, which he did, and continued sending her moneys as above stated. He does not produce any copies of any letters written by him, or the letters received by him from her, so that all of this testimony rests upon his uncorroborated word as to the contents of these written communications. He further testifies that in June of 1902 he sent her steamship tickets for herself and children, together with about \$70 in money; that she kept the money but returned the tickets; that in September of 1903 his brother, who was coming to America, was commissioned by him to go to Odessa and bring petitioner's wife with him, and for this purpose petitioner sent his brother \$125. The brother went to the wife and endeavored to get her to come, but she refused. There is other evidence that at or about the time of this latter date she also refused to come with another person who also desired to have her come to America.

The petition, as above stated, charges desertion in June of 1900. There is absolutely no proof of this. The master finds a desertion as of March 1st, 1901. There is, in my opinion, no testimony to support this. There is certainly no uncorroborated testimony, and I do not think that the petitioner's testimony

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itself can possibly be construed as showing any desertion as of March 1st, 1901.

The only periods when I think desertion has been proven are as of June, 1902, and September, 1903. The first date named is the time when he sent her the steamship tickets, and she returned them, or they were returned. If this was corroborated, that would undoubtedly show a desertion. But it is not corroborated by any testimony and rests upon his statement alone; and even if it be held that the other testimony in the case sufficiently substantiates his testimony with respect to this matter of the tickets, it does not aid the petitioner in this suit because his petition was filed on the 18th of February, 1904, and the statutory period of two years had not therefore elapsed at the time the suit was brought.

For the reason, therefore, that I do not find in this case any proof of willful, continued and obstinate desertion for two years prior to the filing of the petition, I will advise a decree dismissing the petition.

SISCILIA SBARBERO (otherwise called Matilda Barber),
guardian, &c.,

v.

ALEXANDER A. MILLER et al.

[Decided January 8th, 1907.]

1. Judgments are presumptively only conclusive against parties in the character in which they sue or are sued.

2. The necessity of mutuality in estoppels by record requires that a court should not hold a judgment conclusive in favor of a person, unless it would be equally conclusive against him.

3. A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered

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4. A judgment in favor of plaintiff in ejectment, defended on the ground that his title was founded on a conveyance executed by one not having sufficient mental capacity, is not *res judicata* that the grantor was *non compos*, although the jury, in a special finding, so found. The judgment being entered for plaintiff, this element did not enter into it.

5. In a suit to set aside an assignment of a leasehold interest on account of the mental incapacity of the assignor, the finding of a committee in lunacy, a few months after the conveyance, declaring the assignor a lunatic, is only *prima facie* evidence of his incompetency.

6. In a suit to set aside an assignment of a leasehold interest on the ground of the mental incapacity of the assignor, evidence examined, and *held* to fail to show that there was any such impairment of the assignor's mind as made him incapable of understanding in a reasonable manner the nature and effect of his acts or of the business that he was transacting, essential to warrant a decree of cancellation.

7. In a suit to set aside an assignment of a leasehold interest on the ground that the purchaser paid less than the market value for it, evidence examined, and *held* not to establish that there was any market value of the leasehold interest in excess of what was paid for it.

Heard on bill, answer, cross-bill, answer to cross-bill and replications.

This is a bill filed by John Barber, a lunatic, by Cecilia Matilda Barber, his guardian, against Alexander A. Miller and another. The bill charges that on the 26th of June, 1903, John Barber, then being in a state of lunacy, did, by deed of assignment, transfer unto Anna C. Miller a certain lease of property known as No. 879 Broad street, Newark, New Jersey, and that the said Anna C. Miller, on the 1st of July, 1903, assigned said lease to Alexander A. Miller; that on the 10th of October, 1903, Matilda Barber was appointed by the orphans court of Essex county, as guardian of John Barber, a lunatic, and by the proceedings in lunacy it was, among other things, determined that the said John Barber was, at the time of the said proceeding, namely, on the 9th of September, 1903, a lunatic without lucid intervals, and that he had been a lunatic for the space of two years and six months then last past; that John Barber, at or about the date of the conveyance of the leasehold, as above stated, disappeared from his home in the city of Newark and has never been heard of or from since; that the said Alexander A. Miller has collected the rents of the premises from the 1st of July, 1903,

and is still collecting the same; that Alexander A. Miller was informed before the transfer of the lease by John Barber to him of the lunacy of the said John Barber and was thoroughly aware of the lunacy before the transfer was made; that said leasehold is valuable, having a market value of about \$10,000, and that said John Barber received from Miller for the said property much less than its true market value, to wit, \$3,500 or thereabouts; that the guardian made legal tender to Miller of the sum of \$3,500 on the 27th day of October, 1904; that Miller, on or about the 1st day of January, 1904, brought an action of ejectment in the supreme court of this state seeking to oust said Matilda Barber and others, the wife and children of the said John Barber, from the possession of the second and third floors of the said building; that said suit was tried, certain questions were submitted to the jury, which found a special verdict, which special verdict is set out in full in the bill, and that on motion in the supreme court a verdict was directed to be entered for the plaintiff therein, Miller; that an opinion was filed in the supreme court directing the entry of the said judgment, which opinion is set out in full in the bill.

The complainant prays that the said lease from John Barber to Miller may be avoided and Miller be directed to reassign the same to the complainant; that a reference be had to a master to ascertain the amount due from Miller to the complainant, and that an injunction issue restraining Miller from issuing execution in the ejectment suit aforesaid.

To this bill Anna C. Miller files an answer admitting that she took title to the lease from Barber as a convenience for the defendant Alexander A. Miller, and that she has no interest.

Alexander A. Miller answered admitting the appointment of the guardian, the purchase of the leasehold by him, denying, however, that John Barber was in a state of lunacy at the time, or was in any way affected mentally; sets out that while he has collected some of the rents, the family of John Barber has collected a much larger proportion of them; specifically denies that he had any knowledge, or that there was any implication on his part of knowledge of the alleged lunacy of John Barber; denies that the market value of the leasehold was \$10,000, and

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asserts that the amount paid, \$3,500, was a full, fair and *bona fide* value; admits that some tender was made, but denies knowledge of the amount; admits the ejectment suit for the second and third floors of the building; admits that the supreme court filed an opinion, but denies its relevancy to this suit; sets out the affirmative defence of the defendant, and prays to be dismissed.

By way of cross-bill he asks an account of the rents received by the complainant and a decree that she be required to pay the same to him.

The answer to the cross-bill and the replications are formal and do not require specification.

Messrs. Munn & Church, for the complainants.

Mr. George H. Peirce, for the defendants.

GARRISON, V. C. (after stating facts).

It will be observed that while, in the charging part of the bill, the complainant alleges that she tendered, as guardian of the alleged lunatic, to Miller, the purchaser of the leasehold, the consideration paid by Miller for it, namely, \$3,500, she does not in the prayer of her bill ask that the *status quo* be restored by the conveyance back to her of the leasehold interest, and the payment by her of the consideration received for it. She prays that the assignment of the lease from Barber to Miller be avoided, and Miller be directed to reassign to her, and that a reference be had to ascertain the amount due from Miller. This prayer must have been based upon the theory that she would prove, as alleged in the bill, not only that Barber was insane, and that an inadequate price was paid for the property, but also that Miller had knowledge of Barber's insanity, and therefore was not entitled to be reimbursed the consideration money paid by him. There was some attempt to prove that Miller had knowledge, but it entirely failed, and I shall therefore treat the case as if it were one in which the complainant prayed for a restoration of the *status quo*.

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The initial matter to be dealt with arose during the progress of the final hearing, and the court disposed of it without giving the reasons for its ruling; and since, if the court erred in such ruling, a correction thereof will be dispositive of the case, I think it best to take up this subject first.

Before the complainant introduced any oral testimony she put in evidence the record of the ejectment suit in the supreme court. At the time of putting this record in evidence counsel for the complainant remarked that he thought it operated as a bar or estoppel against the defendants, and the court inquired whether he desired to rest upon it as such and therefore not to introduce any further or other evidence excepting as to tender. Counsel for the complainant not being willing at that time to take that position, proceeded with the examination of his witnesses and took testimony tending to prove the insanity or lack of mental capacity of John Barber, the knowledge or implication of knowledge thereof on the part of Miller, the value of the leasehold and the tender made by the complainant to the defendants.

When the defendants began their case and sought to interrogate a witness concerning the mental capacity of John Barber an objection was interposed by the complainant to such evidence upon the ground that the judgment in the ejectment suit was a bar or estoppel. The record of that suit in evidence may be briefly summarized as follows: Miller sued in ejectment for the possession of the second and third floors of the premises No. 879 Broad street, and declared upon the assignment by John Barber of the lease in question. He made as defendants Cecilia (or Sisillia) Barber, Catilda Barber and Elizabeth Barber. The defendants pleaded not guilty. It is quite evident that their defence was that John Barber, at the time of selling the lease, was insane to the knowledge of Miller, that the latter paid an inadequate price, and that the deed of assignment was void. The trial court left to the jury certain questions of fact and requested special findings. The jury, among other things, found that on the day of making the assignment John Barber was mentally incapable of understanding the nature and effect of the transaction in which he was then engaged; that Miller did not know at that time,

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nor did he have such knowledge as would lead a reasonably prudent person to the belief, that said John Barber was mentally incapable of understanding or appreciating the nature and effect of the transaction in which he was then engaged; that the price paid by Miller was not the fair market value at that time, but was \$1,500 below such fair market value. The commission in lunacy proceedings were adverted to, and the fact that

"in pursuance of said proceedings, Matilda Barber, one of his daughters, who is also a defendant in this action, was appointed as guardian by the orphans court on October 10th, 1903, prior to the beginning of this action,"

and that said Matilda Barber, together with her mother and brother and sisters, were in actual possession of said second and third floors at the time of the beginning of the suit, and that no formal tender of any amount to Miller was ever made by or on behalf of John Barber or his guardian.

Upon motion in the supreme court a judgment was ordered to be entered upon this special verdict in favor of the plaintiff.

The contention of the complainant in the suit at bar is that the judgment just referred to in the ejectment suit is a bar or estoppel, or, to properly phrase the matter, is conclusive evidence between the parties hereto, and establishes that John Barber, at the time of the assignment of the lease, was *non compos*, and therefore that subject is not open for litigation in the pending suit.

The defendant replies, first, that the prior suit was not between the same parties, since Matilda Barber, by whom John Barber brings this suit as his guardian in lunacy, was not a party therein as guardian, nor was John Barber a party.

It is true that judgments are presumptively only conclusive against parties in the character in which they sue or are sued. *McBurnie v. Seaton*, 111 Ind. 56. And there are numerous instances in which one who was a party in his individual capacity is not bound by the judgment in another capacity, such as executor, trustee or guardian, and *vice versa*. *Davis v. Davis*, 30 Ga. 296; *Erwin v. Garner*, 108 Ind. 488; *Lander v. Arno*, 65 Me. 26; *Terrill v. Boulware*, 24 Mo. 254; *Rathbone v. Hooney*, 58

N. Y. 463; Landon v. Townshend, 112 N. Y. 99; Coffin v. City of Brooklyn, 116 N. Y. 165; Collins v. Hydorn, 135 N. Y. 320; First National Bank v. Shuler, 153 N. Y. 172 et seq.

The absolute necessity of mutuality in estoppels by record requires that the court should not hold a judgment conclusive in favor of a person unless it would be equally conclusive against him.

Parties in the capacity in which they sue and are sued are undoubtedly bound; privies, likewise. But this is not the limit to which the courts have gone. The courts have held that where a person was either a party to the record in some capacity, or had so allied and identified himself with a party as to have had his rights submitted by his consent to the determination of the court in a given case, he is bound by the judgment as if he was an actual party to the record, and if an actual party to the record in some capacity, is bound in every capacity in which his rights were affected.

Furthermore, in the suit in hand, I find that the supreme court refers to the fact that Matilda Barber was appointed the guardian, and recites that she was in actual possession of a part of the premises, and as guardian requested a reconveyance, and offered to return the amount of consideration upon a proper accounting. *Miller v. Barber, 62 Atl. Rep. 276 (Supreme Court, 1905).*

I do not, therefore, rest my ruling, with respect to the admissibility of this testimony, upon the fact that Matilda Barber, as guardian, was not a party defendant in the ejectment suit.

I assume, for the purpose of this ruling, that the prior suit was one in which the complainant here, as well as the defendant here, were each parties in the capacities in which they stand in the pending suit.

I ruled that the testimony offered by the defendants as to the mental capacity of John Barber was admissible, and that the judgment in the ejectment suit was not conclusive evidence as between these parties that John Barber was mentally incompetent at the time in question.

The fundamental principle of *res adjudicata* is that the sub-

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ject-matter must have been settled in the previous litigation between the same parties.

"A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it." *Herm. Estop.* 105 § 105. "Even parties and privies are bound only so far as regards the subject-matter then involved, and are at liberty to raise the same questions in another distinct controversy affecting a distinct cause of action." *Herm. Estop.* 124 § 118. "And they will not be concluded unless the judgment necessarily involved the matter which it is sought to be held as conclusively settled by the litigation." *Herm. Estop.* 291 § 252 *et seq.*

A verdict and judgment, therefore, are conclusive by way of estoppel only as to the facts, without the existence and proof or admission of which they could not have been rendered. *Herm. Estop.* 294 § 254. See, also, *Coutant v. Feaks*, 2 *Edw. Ch.* 330; *People v. Johnson*, 38 *N. Y.* 63; *Cauhape v. Parke, Davis & Co.*, 121 *N. Y.* 152; *Gilcreast v. Bartlett* (*N. H.*), 64 *Atl. Rep.* 767; *Freem. Judg.* (3d ed.) 305 *et seq.*; *Mullaney v. Mullaney*, 65 *N. J. Eq.* (20 *Dick.*) 384 (*Court of Errors and Appeals*, 1903).

In the case of *Hawks v. Truesdell*, 99 *Mass.* 557, it was held that where the special findings of a jury in an action at law were not confirmed by the judgment of the court, nor involved in the general verdict, they were not conclusive of the facts found, and either party might introduce evidence concerning the subject-matter in a trial before another jury in the same suit or in another suit.

In *Springer v. Bien*, 128 *N. Y.* 100, the court said: "Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties constitute a bar unless followed by judgment based thereon, or into which the verdict or finding entered. It is the judgment which constitutes the bar, and not the preliminary determination of the court or jury. So, also, and for obvious reasons, although judgment has been entered, the judgment does not prevent the relitigation of any irrelevant fact, although it may have been litigated and found in the prior action."

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In the situation in hand it is obvious that it was not necessary to settle that John Barber was insane in order to sustain a judgment in favor of Alexander A. Miller against the defendants in that suit that he was entitled to the possession of the property. In fact, quite the contrary is the case, because if John Barber were sane there was no suggested defence to Miller's action.

The things, therefore, which it was necessary to find in favor of Miller were a title from Barber, and innocence of any knowledge on his part of any incapacity on Barber's part. Since the defendants failed to prove that Barber was insane to Miller's knowledge, they failed in their defence, and I do not see how it is possible to hold that by thus failing they established, as between themselves and Miller, any part of that which they must have proved to have succeeded.

That judgment may properly be said to show that proof of Barber's capacity in that suit was immaterial and irrelevant.

Without proof that Miller was chargeable with knowledge of Barber's incapacity, proof of Barber's incapacity was irrelevant in the ejectment suit, and hence it cannot be held that it was therein settled as between the parties. The cases heretofore cited are authority for the principle that a settlement in a previous suit of an irrelevant matter which did not enter into the judgment is not conclusive in subsequent litigation.

Furthermore, I think that the fact that Miller is sought to be bound by a finding in a suit from the judgment entered in which he was powerless to appeal, or to take proceedings for review, makes strongly against the claim that he is concluded by such finding. Every fact which must have been found in his favor to have sustained his judgment, of course, binds him. But with respect to the matter which the complainant here seeks to have Miller bound he was powerless to obtain a review. The judgment not being in any way founded upon the fact of Barber's incapacity or insanity, and being in Miller's favor, should only be held conclusive against Miller of those things which must necessarily have entered into it to justify or sustain it.

To hold that a defendant has had settled in his favor certain facts in the face of a judgment in favor of his opponent which

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does not rest upon such facts and is regardless of them, is, in my view, unjustifiable.

The complainant herein not having made out her defence in the lawsuit, and the defendant herein having entirely succeeded in the lawsuit, I hold that the latter's judgment is only conclusive of those facts which necessarily entered into it. It did not necessarily enter into that judgment that John Barber was insane, or that the purchaser of the leasehold had paid less than the market value for it.

I therefore ruled that those two subjects, not being concluded by the previous judgment, were proper subjects upon which to introduce testimony in the pending suit.

This brings us to the merits of the case.

I find the facts as follows: John Barber, in 1903, was about sixty-two years of age. He was an Italian, coming from a little settlement called Peruza, near Genoa. He was married and had at least six children, four girls, named Sisillia, Elizabeth, Julia and one whose name was not mentioned in the testimony given at the hearing, and two boys, Victor and Joseph. He came to the United States and settled in Newark. He was engaged in the selling of fruit from fruit stands on the street or in stores.

On the 20th day of June, 1890, he obtained the assignment of a lease on property No. 879 Broad street, in the city of Newark. Broad street is the main business street of Newark. This lease expired in 1908, and required him to pay a ground rent of \$472.50, and provided that at the expiration of the term he might elect to have another term of twenty years upon a rent to be agreed upon between the parties, or, if they could not agree, then the amount of rent was to be settled by three arbitrators of which each party was to select one and the two thus selected were to choose the third. It was further provided that at the expiration of the lease the landlord (which was a church corporation) would either take over the building at a valuation to be fixed in accordance with provisions in the lease, or the tenant should remove the same in ten days if the landlord did not purchase it.

The building in question standing upon the land at the time he leased it was an old five-story brick building. Upon the

ground floor was a store fronting a little over fifteen feet on Broad street and extending back about fifty feet. The lot extended back from the street some one hundred and sixty feet to an alley, but it tapered so that at the alley it was only seven feet in width, and the back premises were useless for any other purpose than for egress, ingress and the storage of material. Above the store were flats. All the testimony in the case shows that a full rental value of the entire building was about \$1,500 a year, the store being fairly rentable for from \$75 to \$100, the next two flats for between \$20 and \$25 each, the fourth floor for \$12 or \$15, and the top floor for from \$9 to \$12 a month.

Barber fitted up the ground floor for his fruit store, and occupied, with his family, the second and third floors, renting the other two to tenants. This continued down to December, 1902. At that time he was in debt to the extent of some \$1,300. He was the executor of the estate of Rosa Schmidt, who was his sister. He was also a beneficiary under her will to the extent of one-third. The estate consisted of real estate and money, and there was a partition suit pending. While there was money in this estate at the time it had not then been settled as to how this money was to be distributed—that is to say, whether the beneficiaries would get part land and part money, or whether one would get money and the other land, or whether they would all have to wait until the partition suit was completed and a sale had.

Prior to December, 1902, he endeavored to sell his fruit business to a man who was a nephew of a friend of his named Mollinelli. He first wished to sell to Mollinelli, who was also a fruit dealer, but Mollinelli did not desire to enlarge his business by buying this other one, and said that he had a nephew who might be interested. Before carrying on any negotiations Mollinelli interviewed the wife of John Barber to ascertain whether she was willing that her husband should sell out the business, and testifies that she was willing. The negotiations then went on between Barber and the nephew of Mollinelli, with Mollinelli present, until Mrs. Barber upon one occasion visited Mollinelli and stated that she was not willing that the business should be sold at the price that was being suggested, which was in the

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neighborhood of \$600. Thereupon Mollinelli withdrew from any further participation in the matter, and his nephew and Barber could not come to terms.

Barber thereafter offered his business for sale to Zazzalli, meeting him in the fruit market and talking with him about the same. His first offer was to sell at \$1,100. Subsequently, upon his again approaching Zazzalli, he was met by a counter-offer by Zazzalli of \$800. This he refused. Further negotiations were had between them, and finally Barber agreed to take \$1,000.

He then took Zazzalli to his lawyer, Mr. Trimble, and the bargain was told to Mr. Trimble, and about the 3d day of December, 1902, a bill of sale of the business and a lease to Zazzalli from Barber for the store at \$70 a month were made and executed and the money paid, and thereafter Zazzalli carried on the business, Barber assisting him for a little time to introduce the customers to him.

I may here state that there is no evidence that what Barber sold at that time was worth any more than he got for it. About the same time, or a little after, Barber went to see the same lawyer, Mr. Trimble, with Mollinelli, who quite often acted as an interpreter for him, being able to speak the same dialect of Italian which he spoke, and wished to retain Mr. Trimble as associate counsel with Mr. Smith, who was attending to the settlement of the Rosa Schmidt estate and the partition suit. Barber informed Trimble that the trouble was that Mr. Smith was very slow, and the matter was not being settled up as rapidly as he wished, and he wanted Mr. Trimble to go into the matter so as to hurry Mr. Smith. Mr. Trimble saw Mr. Smith and got information from him, and reached the conclusion that matters were progressing properly, and when Barber next called upon him he informed him that there was no occasion for him to do anything just then. At about this time—that is to say, in the early spring of the year 1903—the matter of the settlement of the account of the Rosa Schmidt estate came up, and Barber visited Smith, the lawyer, several times, and the account was prepared by Smith, Barber producing whatever receipts he had for debts of the estate, or legacies that he had paid as executor, and that account was passed.

About the same time, in the early spring of 1903, Barber began to endeavor to dispose of the leasehold of No. 879 Broad street. He endeavored to sell it to various people. Among others, he began, some time in March, to have negotiations with August J. Miller, the brother of Alexander A. Miller. The Millers were in the electrical business around the corner of Broad street, on William street, and Barber, with Mollinelli, visited their establishment. These negotiations continued over a period of three months. Upon the first visit Miller was merely asked whether he would give \$7,000 for a property on Broad street, and he replied that if the property was right he would, but Barber did not at that time state what property he referred to. Subsequently he came back and stated that the property was No. 879 Broad street, and Miller then wanted the papers that showed Barber's interest in the property. These were furnished and were taken to Coult, Howell & Ten Eyck, the counsel of Miller, and examined by them and reported upon favorably. Thereupon negotiations were continued, Miller refusing from the beginning to contemplate paying \$7,000, but finally offering to pay \$5,000, or, rather, he took an option for thirty days to purchase the leasehold at \$5,000.

It was the understanding—Barber having so stated—that Miller could have immediate possession of the property. Miller's object in buying the property was to move his business around onto Broad street, which was much more desirable for him than William street, and of course he had in mind the desirability of getting there as soon as he should purchase this leasehold. Barber had informed Miller that the store property was leased to Zazzalli, but having informed him that he could get immediate possession, Miller was surprised when he learned, as he did subsequently by seeing the Zazzalli lease, that to get Zazzalli out he would have to pay him \$1,000. He thereupon broke off all negotiations with Barber, telling him that since he had misrepresented this matter he would not any longer contemplate exercising his option to purchase. Thereafter Barber returned to see him and wanted Miller to make an offer. Miller then offered \$3,500. He states that this offer was based upon the \$5,000 offer previously made, of which \$1,000 would have to go

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to Zazzalli to get him out, \$250 to Mollinelli, whom he had agreed to pay for his services, and \$250 to the person from whom he intended to borrow the money with which to make the purchase. Finally Barber accepted this offer, and a date was fixed for settlement in the office of Coult, Howell & Ten Eyck. Upon that date, the 26th of June, 1903, Barber, Mollinelli and the Millers attended at Judge Ten Eyck's office to make the settlement.

There was a mortgage of Barber's which had to be paid to the mortgagee, and the balance was to be paid Barber in cash. Miller produced two checks making up this balance, one of which was certified and the other of which was not. Barber objected to taking checks, wanting cash. It was explained to him that certified checks were as good as cash, and that immediately upon presenting the same at the bank and being identified he could secure the money. He thereupon acquiesced in taking the certified check, but would not take that one of the checks which was uncertified. All of the witnesses agree that the parties were together between two and two and a half hours while these checks were being certified, and while the figures were being gone over and the matter explained.

Finally the whole matter was explained to Barber, and he understood it, or said that he did, and took the checks and left. Coming out of the lawyer's office he informed his friend Mollinelli that he was going away, but had not determined whether to go to California or Italy. It appears that he had, between December 3d, 1902, and June 26th, 1903, cleaned up his business, so that he had the \$1,000 from the sale of the fruit store, the \$3,500 from the sale of the lease (less about \$900 paid to the mortgagee), and, in addition, that which was coming to him from the Rosa Schmidt estate. This latter sum was about \$4,000. He had this money in bank as executor, and it turned out that it was just about, if not exactly, his share, and he withdrew that money for his personal use, making all told about \$7,600 in cash.

He left Newark on the last-named day, and, according to his family, entirely and successfully disappeared from view. The defendants, however, proved, without contradiction, that he went

to his old home, where his relatives were, at Peruza, and is now there. They also proved, without contradiction, that the family received a letter from Italy conveying that information to them some five or six weeks after the date in June, 1903, when he left.

It is contended by the complainant that John Barber was insane, and was not competent to properly transact business, or to know the value of what he had or of that with which he was dealing. They base this, so far as their oral testimony in this cause is concerned, upon the evidence of a physician, John Barber's eldest daughter, his eldest son, a niece who did not live with them, but did live in Newark; a barber who lived in the neighborhood, and two tenants of one of the flats in the house.

A fair statement of their testimony is that John Barber, up to 1901, was a kind, considerate father, and a man who, although illiterate and of humble origin, was intelligent; that, beginning at the time just named, he became a suspicious man, believing or expressing the belief that his wife and children were bad sexually, and were also robbing him or taking money from him. He was always a man who drank alcoholic liquors, although he does not appear often to have been intoxicated. They testify that he was constantly making these charges of immorality and of dishonesty against his family; that he would watch for the coming of the men that he suspected were coming to his home to have sexual relations with his family.

Some of the testimony is explicable from other of the testimony in the suit. For instance, it is testified that when he accused the children of taking money from the till they denied it and said that it must have been taken by somebody else, outsiders, strangers, and he locked the gates, or took certain precautions which he did take, because he wished to be sure that no one else had access to the place where the money was, excepting the family.

It is also in evidence that one of the girls was in the habit of receiving her young man caller in the front hall of the building, and of staying down there with him until very early hours of the morning. He vehemently objected to this conduct, in which she was upheld by the other members of the family. His out-

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bursts of anger and charges of immorality or badness may be, to a great extent, traceable to such incidents or causes.

None of the testimony of the complainant concerns the condition of this man's mind in the transaction of business, or casts any direct light upon his ability to transact business. There is some little evidence by the complainant's witnesses that he did not at times make correct change to purchasers, but such evidence is very trifling in amount and weight. It is possible, in my view, that, leaving out the physician who testified on behalf of the complainant, all that the complainant's witnesses testified to may have been true without in any way proving that the man was not perfectly competent to transact business and to know the value of his property, and to negotiate intelligently for its sale. I think it is quite possible that an Italian who was in the habit of drinking, and who was angered at his family, might have raved and stormed at them and accused them of all kinds of things, and yet have had entire mental equipment of a sound nature to enable him to transact his ordinary business with all the skill that he ever possessed. The physician produced by the complainant did give his opinion that the man was not able to transact business, but such opinion was not based upon any experience with the man in this respect, and was based solely upon his view of what he termed Barber's "delusions." These "delusions," according to the physician, were that members of his family were immoral, and that they were robbing him. According to his testimony, he had been suffering from the disease which produced these delusions for at least two years prior to the 26th of June, 1903.

I am inclined to think, from the testimony, that this man had no delusions in the proper sense of that term. The doctor assumed that he had delusions, or testified that he had delusions, and then testified that one thus circumstanced would not have been able to transact business. But all of the testimony shows that these alleged delusions were never disclosed to anybody excepting those people above named, all of whom were members of his family, or were in his own house; that he never disclosed them to outside persons, excepting the doctor, under any circum-

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stances; never mingled his family affairs with his business dealings, and never, in conducting his business, was diverted therefrom by any outside topic.

I am inclined to think that he did not have delusions, but did have certain grievances against his family which may or may not have been well founded.

The uncontradicted testimony is that the family did as it pleased, practically, in the matter of taking money from the store, and that he was displeased with the conduct of one or more of the girls. As I have before said, I think it quite possible that a man of the race of which this man was, and of his condition of life, and who was accustomed to drinking, might well behave in the way that he is testified to have behaved in his family and with his family without in any way having any mental aberration or mental unsoundness.

In addition to the oral testimony delivered at the trial, the complainant also produced and put in evidence a finding of a commission in lunacy on the 9th day of September, 1903, declaring John Barber a lunatic, of whom subsequently his eldest daughter was appointed guardian. This proceeding was, of course, *ex parte*, and is only *prima facie* evidence. *Mott v. Mott*, 49 N. J. Eq. (4 Dick.) 192 (at p. 196), and cases cited; *Kern v. Kern*, 51 N. J. Eq. (6 Dick.) 574 (at p. 583). I will not further discuss the weight of this finding, because, while in a doubtful case I should give great weight to the determination of commissioners and a jury, I do not see that it is entitled to any more than *prima facie* effect in the face of a fully-tried issue in this court.

Particularly would I be inclined to treat it in the way indicated when, as in this case, the alleged lunatic was not served with notice of the commission and was not present, and was not seen or examined by the commissioners or the jury.

The complainant also produced the judgment in ejectment, which has been heretofore referred to and dealt with in a previous part of this opinion.

On behalf of the defendants a medical expert was produced, the gist of whose evidence was that if this man was suffering

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from delusions of the character testified to by the complainant's physician, such delusions would have persisted; that the subject could not or would not listen to reason concerning them (which it was shown that this man did), and that such subject would not or could not refrain from disclosing these delusions to everyone with whom he came into intimate or prolonged contact; that if the subject had any such delusions, whether induced by the disease known as "paresis" or that produced by alcohol and termed "alcoholic pseudo-paretic dementia," he would not have been able to do the things which he was indisputably proven to have done in the manner and way in which they were done and shown to have been done by him.

This physician further testified that it was impossible for a man to have had either of the above-named diseases for the period claimed by the complainant without having shown physical evidences thereof, whereas all of the testimony shows Barber to have been in practically perfect health physically, being large, robust, ruddy and hearty.

The next class of evidence adduced by the defendants was of those who had casual dealings with Barber up to the time of his leaving Newark. These witnesses were men of substance and intelligence. They were lawyers or business men, and all testified that in their dealings with him—buying fruit or ordering fruit—they were waited upon in a proper manner, and saw nothing of a suspicious nature about Barber, nothing that led them to suspect that he was not sound in mind and in body, and that in whatever conversations they had with him he seemed perfectly rational.

The defendants also produced a lawyer named Egner, who was consulted by Barber concerning the making of a bond and mortgage for him, and who made the same and had them executed before him as a master; Mr. Trimble, who closed the deal for the fruit store, and who subsequently had the interviews concerning his participation in the litigation over the Rosa Schmidt estate; Mr. Smith, who had charge of that litigation, and who also had charge of the Rosa Schmidt estate in the orphans court and in the partition suit, and Judge Ten Eyck, who had the

closing of the deal at the sale of the leasehold. These four lawyers had every opportunity to observe this man under most critical circumstances, and each of them obtained the distinct impression that the man was rational—knew what he was doing—and appreciated the transaction taking place.

In addition thereto the defendants produced an intimate friend of Barber, Mollinelli; the Millers, who purchased the leasehold, and Zazzalli, who purchased the fruit store, and they all testified to the details of the transactions with Barber, and to the fact that he was entirely rational, knew what he was doing, and was intelligent and shrewd.

When one considers all of the testimony, I do not see how a reasonable conclusion can be reached that this man lacked mental soundness. The rule as to the mental capacity requisite in cases of ordinary contracts is well settled in this state, and the test is, Did the person whose act is brought in judgment possess sufficient ability at the time he did the act to understand in a reasonable manner the nature and effect of his act or the business he was transacting? *Kern v. Kern*, 51 N. J. Eq. (6 Dick.) 574 (at p. 579) (*Vice-Chancellor Green*, 1893). In that case the vice-chancellor observed:

“The old doctrine that the mind, although it has different faculties, is one and indivisible, and that if any of its parts is disordered, or if it is in any way diseased, or its healthy operation in any function disturbed, it is an unsoundness which affects the whole organ and renders the person legally of unsound mind and incapable of entering into a civil contract, is no longer recognized.

“The question, under the present state of the law, is not whether the mind of the party was in any way affected or impaired, but whether, such being the case, the impairment or defect of the mind influenced or inspired the act which is the subject-matter of consideration, for, admitting that the party was subject to some delusion, or that his mind was in some faculty impaired, if the act challenged is not traceable to, and has not probably been influenced by, the defect of intellect, but is the result, so to speak, of the action of the unimpaired faculties of his mind, it will not be disturbed.”

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And further (at *p. 586*):

"A man may be mentally unsound, in a medical point of view, from certain conditions which exist, which would not, in a legal sense, relieve him from responsibility. He may be subject to mania, and medically of unsound mind, yet if the peculiar phase of mania had no influence upon the act brought in question, such act is not, in the law, invalid. He may be an imbecile, and medically of unsound mind, but if he has sufficient mind to reasonably understand the act which is brought in question, he is legally competent."

Applying the principles deduced from the cited case and those which it cites, it is clear that the complainant has utterly failed to prove that there was any such impairment of John Barber's mind as made him incapable of understanding in a reasonable manner the nature and effect of his acts or of the business that he was transacting, or that the act challenged was traceable to or influenced by any delusion. My impression is that he had, by reason of his grievances against his family, determined to leave. He expressed to his intimate friend his dissatisfaction with the expenses under which he was laboring, and stated that his family were living too expensively; that he wished them to move out of the high-priced neighborhood like Broad street, and enable him to rent the flats they were then occupying to others, and himself to rent a flat in a less expensive neighborhood for them. He also objected to their taking money, as they had been accustomed to do, from the till in the store. He also, according to their testimony, though not confirmed by outsiders, objected to their morals in sexual matters. As has been already seen, he was in a position to gather together quite a little money, and had expressed a desire to return to Italy, and at one time had asked his family to do so. I think that he conceived the desire or the intention to go back to Italy, or to at least leave his family; that he cast about him to get what money he could; that he had three sources from which to get it; one was his business, another was the leasehold and a third was whatever was coming to him from the estate of his deceased sister. I cannot find that in any one of these matters, each of which he

settled up, he failed to bargain as any man similarly situated would have bargained. It may possibly be true that, with respect to the leasehold, he could have obtained more if he had been willing to wait or to seek other buyers after a more extensive endeavor. But if it be true, as I have suggested, that he was now desirous of leaving, it was perfectly natural for him to close when he found that he had gotten as much as he could get from the customers that he knew of. In other words, he had attempted to sell this lease to other people and had been unsuccessful. He finally found a man who would negotiate, and for three months he carried on negotiations, and finally, as I have stated, he closed. In respect to the Schmidt estate, he seems to have clearly understood at all times the situation, which was rather a complicated one. He was executor of the estate, and as such was, of course, the trustee of whatever moneys he received. He was a beneficiary under the will, and as such entitled to his share of the personalty, and was also entitled to one-third of the amount realized in the partition suit. He seems in some way to have arrived at the exact amount to which he was entitled, and to have taken that, and no more. The other beneficiaries feared that he had taken more, and levied an attachment upon his interest in the estate, but it subsequently developed that he had not taken from the funds in his hands as executor any more than his share of the personalty and of the proceeds of the sale of the realty.

In the sale of his fruit business, as I have before stated, he seems to have obtained all that is proven to have been the full value of it. We therefore see that in every business matter (which is the only thing with which we are concerned) he displayed such intelligence as a man of his origin and upbringing would have, and seems to have bargained with shrewdness, and to have seen to it that his bargain was carried out to its culmination with entire regard to commercial principles and the proper conduct of business. Under these circumstances I do not see how the court would be justified in finding that this man lacked mental soundness.

2 Buch.Sbarbero v. Miller.

This conclusion makes it unnecessary to enter into an extended consideration of the question of the adequacy of the price paid by Miller to Barber for the leasehold. Much of the testimony offered was with respect to this matter. The solution of the question is not unattended with difficulty. The subject-matter is not one that can properly be said to have a market value. A lease having about five years to run, with the privilege of an extension if an agreement could be reached as to rent, with a proviso that the building must be removed if no agreement is reached for extension, the building being one unadapted for commercial use excepting the first story, and that only usable for a store of modest dimensions, the term being too short to justify the removal of the building and the erection of another, show elements making it extremely difficult to say what the value of such a lease was.

The experts themselves in their testimony demonstrate the uncertainty of the whole subject. Scarcely any two figured with the same factors. Some based their idea of value upon what the property would be worth to one who greatly desired it and was willing practically to lose money on it for the additional value such location would give his business. Others figured upon it entirely from an investment standpoint. They varied in their estimates of value from nothing to \$10,000 or more. I can only say that the complainant did not, in my view, establish by the evidence that there was any market value for this lease in excess of what was paid for it.

I will advise a decree dismissing the bill and sustaining the prayer of the cross-bill as to an accounting.

The decree will be settled upon notice.

Palladino v. Hilpert.

72 Eq.

PIETRO PALLADINO

v.

JOHN A. HILPERT and FRANK SCUTELLARO.

[Decided January 23d, 1907.]

1. If it be the rule that a sheriff must first levy an execution on personal property before levying on real estate, his impropriety in not doing so is a subject for correction by the court out of which execution issued, and the debtor cannot invoke injunctive relief.

2. In a suit to restrain an execution sale, evidence considered, and *held* insufficient to show that the real estate in question sold for an inadequate price.

3. In a suit to restrain an execution sale, it appeared that before the writ was issued, the attorneys of the judgment creditor notified the debtor that the judgment had been docketed, and that, unless he settled, they would issue an execution; that he paid no attention to such communication, and that the sheriff in levying actually notified the debtor, and after the execution was levied, the attorneys again wrote the debtor, notifying him that the property would be advertised for sale. The debtor testified that he had gone to a lawyer to have the judgment opened, and that, as the lawyer told him not to do anything, he supposed the lawyer was taking care of him.—*Held*, that the facts were insufficient to show that the debtor was under any mistake or misapprehension as to the situation, whereby he failed to protect himself at the sale.

Heard on motion, affidavits in support thereof and affidavits on behalf of defendants.

This suit was instituted by a bill praying that a judgment docketed from the district court of Hoboken in the Hudson county common pleas be decreed a nullity and void, and that a sale of real estate belonging to the complainant, made by the sheriff of Hudson county on December 13th, 1906, to the defendant Scutellaro be declared void.

Upon this bill and affidavits in support thereof a motion was made for a preliminary injunction restraining the defendant Scutellaro from obtaining from the sheriff of Hudson county a

2 Buch.Palladino v. Hilpert.

deed for the premises sold by the sheriff to Scutellaro at the sale aforesaid.

Mr. Horace L. Allen, for the complainant.

Mr. Leon Abbett, for the defendant Scutellaro.

GARRISON, V. C.

The affidavits on behalf of the complainant set out that in 1896 he owned a stock of goods, merchandise and other varieties of personal property of the value of at least \$1,000; that Hilpert, on the day of , obtained a judgment against him in the Hoboken district court for the sum of \$248.50 and costs; that the deponent applied to have said judgment opened; that the execution out of the district court was not attempted to be levied upon his personal property; that he believed that an injustice had been done him by the judgment and had retained an attorney to try to have the same opened, and believes that it would not be necessary for him to pay the said judgment; that he never knew that his real estate was to be sold by the sheriff to satisfy the said judgment, and he never knew that his property had been advertised by the said sheriff; that he did not attend the sale, although he could have easily paid the judgment had he been aware of his situation; that his first knowledge of the sheriff's sale was after it had been held; that his real estate is worth \$14,000, subject to a \$7,500 mortgage, so that his equity is \$6,500, and that the defendant Scutallaro bought in the property for the grossly inadequate sum of \$600.

He produces the affidavit of the deputy sheriff who made the levy, in which he states that he was given the writ on the 4th of October, 1906, and was furnished with a description of the real estate belonging to the complainant and instructed to levy upon said real estate; that on October 4th, 1906, he called upon the complainant at his aforesaid property and showed him such writ of execution and informed him that he levied upon his real estate, and that he should come to the sheriff's office and settle said judgment. He further avers that he did not at that time,

or at any other time, make any levy upon the personal property of the complainant.

There are also affidavits and depositions showing that the sergeant-at-arms of the district court did not attempt to levy upon the personal property of the complainant, but made return that the writ was unsatisfied.

There are many averments in the affidavit of the complainant concerning the original suit between him and Hilpert, the endeavor being to show that the defendant therein, the complainant here, should have succeeded in that suit.

The affidavits of the defendant Scutellaro also contain matter concerning the original suit, and he seeks to show by his own and other affidavits that that suit was properly determined.

The defendant produces affidavits that the real estate of the complainant is not worth more than \$11,500; that the personal property contained in the saloon of the complainant, which he values at \$1,000, was not worth over \$500 or \$600, and that the fixtures in said saloon were covered by a chattel mortgage; that the complainant is not, as he asserts that he is, unable to understand English, but does understand the said language, and has carried on business with English people, and is capable of speaking and understanding that language, and has been in this country over twenty years.

The defendant Scutellaro states the circumstances under which he attended the sheriff's sale to show that it was by no arrangement with Hilpert or with any other person, that he was the holder of a mechanics' lien against the premises for a large sum of money, and was naturally interested in the matter of the sale, and upon being informed by a stranger that the sale was to take place—a fact which he had known but had forgotten—he attended and bought in the property for \$600; that the sheriff announced that the property was to be sold subject to certain encumbrances and liens. These encumbrances are shown to be as follows: A mortgage for \$7,500; a mechanics' lien in favor of Scutellaro for \$4,439.90 with interest from April 10th, 1906; a lien in favor of the Fagan Iron Works for \$444.20; a lien in favor of William J. Walsh for \$385 with interest thereon; a recognizance in the court of quarter sessions for \$200; taxes

*2 Buch.**Palladino v. Hilpert.*

for the year 1906, \$59.40, and water rents amounting to \$21.38. The proofs also disclose that application was made by the complainant in the Hoboken district court to open the judgment obtained by Hilpert against him in that court, and that it was refused; that on July 30th, 1906, the writ of execution was issued out of the district court, and on the 31st of July was returned unsatisfied; that on the 3d of August, 1906, the said judgment was docketed in the court of common pleas of the county of Hudson; that on the 5th day of September, 1906, the attorneys of the judgment creditor wrote a letter to the complainant herein in which they informed him that they had docketed the judgment, and that unless he called at their office by Wednesday of that week and settled the judgment they would proceed to issue an execution in the upper court and sell his property. To this letter they received no answer. On the 2d of October, 1906, the execution was issued out of the court of common pleas, and on the 4th of October the deputy sheriff exhibited this execution to the complainant herein and informed him that if he did not call at the sheriff's office and settle it his property would be sold; that on the 15th day of October, 1906, the attorneys for the judgment creditor wrote a letter to the complainant herein in which they informed him that they had issued execution against him on the docketed judgment and had placed the same in the hands of the sheriff, and that the sheriff had informed them that he had notified Palladino to that effect, and that the latter had paid no attention to it. They then proceed to state that unless this judgment is settled by Thursday of that week they should instruct the sheriff to advertise the property for sale. That they received no response to this letter; that on the 22d of September, 1906, they wrote a further letter in which they stated that unless the amount of the judgment was paid by Wednesday of that week they would have to direct the sheriff to sell him out on execution; that no reply was received to this letter, and thereupon they instructed the sheriff to proceed with the sale; that the sheriff strictly followed all of the requirements as to notice and advertisement, and the sale was duly held on the 13th day of December, 1906, and the property was bought in by Scutellaro for \$600; that Scutellaro paid

\$100 at the time and was prepared to pay the balance, but was restrained by the temporary order of this court granted on the filing of the bill and the affidavits herein.

The complainant insists that he is entitled to the aid of this court to restrain the defendant Scutellaro from perfecting the sale and taking a deed from the sheriff for the property. He asserts that the execution out of the district court should have been levied upon his personal property; that it is improperly docketed, because in the certificate accompanying the application to docket the clerk did not correctly state the return of the officer as endorsed on the writ; that the officer endorsed on the writ that he returned the same

"unsatisfied, not having been able to find any goods and chattels, the property of the within-named defendant, in Hudson county to levy on and sell as I am within commanded."

In the certificate accompanying the application to docket the certification is that the writ was returned by the officer "unsatisfied."

The complainant further insists that the sheriff did not levy on the defendant's personal property, as he was commanded by the writ, but did levy on the real estate; that since the complainant had sought legal advice, and was told not to pay the judgment until his attorney advised him to, he rested secure, and paid no attention to any of the proceedings, and therefore is entitled to the aid of this court in the setting aside of this sale, which he says was for a grossly inadequate price.

The sheriff's return on the writ of execution issued out of the common pleas recites that by virtue of the writ he has seized and levied on the lands and tenements of the defendant as per inventory and description annexed, subject to all prior legal encumbrances, "all the rest, residue and remainder of defendant's personal property value one dollar." To the writ there is annexed a description of the real estate.

With respect to the question of the improper docketing of the judgment and the impropriety of the sheriff in making the levy, I think that it is clear that the complainant herein has an adequate remedy at law, and that this court should not interfere.

If it be the law in New Jersey, as it is in several jurisdictions (11 *Am. & Eng. Encycl. L.* (2d ed.) 654 note 2), that the sheriff must first levy upon the personal property of the defendant, his impropriety in not doing so is a proper subject of correction by the court out of which the execution issued. The court of errors and appeals, in the case of *Voorhis v. Terhune*, 50 *N. J. Law* (21 *Vr.*) 147, lays down the rule that the court upon whose judgment execution issues has full power to set aside an execution sale whenever the ends of justice and fair dealing require it; and there are numerous cases in this state which affirm the right of the common law courts to exercise even equitable powers concerning the executions and sales thereunder in their own courts. *Barber v. Miller*, 73 *N. J. Law* (44 *Vr.*) 38 (*Supreme Court*, 1905). The general principles and numerous cases will be found in 17 *Cyc.* 1280; 25 *Am. & Eng. Encycl. L.* (2d ed.) 783; 17 *Cyc.* 1135.

If it is to be the rule in New Jersey that the sheriff must first levy upon the personal property, under a common law writ, surely such a rule should be established by the courts of law, and the sheriff should be controlled in executing their process in this respect by those courts.

In the case of *Skillman v. Holcomb*, 12 *N. J. Eq.* (1 *Beas.*) 131 (*Chancellor Williamson*, 1858), the court says: "It would take a very strong case of fraud, mistake, surprise or accident to induce this court to interfere with the completion of a sale upon an execution at law," and he points out that all the cases referred to by the counsel for the complainant in that case were those where the court was asked to interfere with the execution of its own process, and he concludes that this is "a very different thing from interfering with the process of another and independent tribunal."

But the complainant points out that there has been established a doctrine in this state that a court of equity will set aside a sheriff's sale on a common law judgment, even if there has been no fraud, where there is gross inadequacy of price, and the party, by reason of mistake or misapprehension, did not attend the sale nor protect his interest thereat, and the sacrifice was caused by such mistake or misapprehension.

This is the rule as formulated in this state. *Raphael v. Zehner*, 56 N. J. Eq. (11 Dick.) 836 (*Court of Errors and Appeals*, 1898). This recent case on the subject relies upon and goes back to that of *Klopping v. Stellmacher*, 21 N. J. Eq. (6 C. E. Gr.) 328 (*Chancellor Zabriskie*, 1871). A careful analysis of that case, which certainly goes to the extreme limit to which such jurisdiction can be extended, shows that the chancellor found that the judgment debtor therein did not believe that the property was to be sold to satisfy the judgment. In that case there had been a judgment in a justice's court for \$44. The judgment debtor made an arrangement with the justice to pay the same in installments of \$6 each and paid six such installments. Thereafter another suit was begun upon the original judgment for the unsatisfied portion of it, about \$9, and the judgment then obtained was docketed and an execution issued to the sheriff. It was shown that the sheriff adjourned the sale so that information might be conveyed to the defendants of the sale, and the chancellor finds that they were so informed; but he says that he cannot believe that they understood and believed that the sale would take place, and he finds from the evidence and circumstances that it appears that they did not believe it, and, thereupon, he finds as a fact that they were under a mistake and ought not to be punished by a loss so great to them as that sale, if allowed to stand, will inflict. The property was bought in for \$52 and was worth, the chancellor finds, \$1,500.

Before this doctrine can be applied to any case it must certainly appear in such case as the fundamental fact that there has been a gross inadequacy of price. It should be noted in the case in hand that the complainant's proofs are barren of any evidence saving his own as to the value of his property, whereas the defendant not only produces his own evidence but that of other witnesses, one of whom, at least, a real estate agent, is entirely impartial so far as the proofs show, and that such evidence on the part of the defendant places the value of the property at not over \$11,500, whereas the complainant testifies that it is worth at least \$14,000.

It is not disputed that at the time of the sale there were, including the mortgage debt, encumbrances amounting to \$13,-

2 *Buch.**Palladino v. Hilpert.*

049.78. If to this is added the \$600 bid by Scutellaro at the sale, we have a total of \$13,649.78. So that even if the complainant's value be taken as the true one, it cannot be said that there was any gross inadequacy of price, or, in fine, any inadequacy whatever.

There was a suggestion on the part of the complainant that the mechanics' liens, or some of them, were not sustainable, but the proofs are barren of any evidence from which this court could find that such was the fact.

The next essential for one seeking the application of the doctrine above stated, after he has established gross inadequacy of price, is to show that he was under some mistake or misapprehension which caused him to fail to protect himself at the sale. I do not find that this complainant was, properly or justifiably, under any mistake or misapprehension. Before the writ of execution was issued out of the common pleas the attorneys of the judgment creditors notified him that the judgment had been docketed, and that unless he settled it they would issue an execution and sell his property. He paid no attention to this. Thereafter an execution was issued, and the deputy sheriff in levying the same actually notified the defendant, and told him that unless he went to the sheriff's office and paid the money his property would be sold. After the execution was issued and levied, and the sheriff had informed him as aforesaid, another letter was written to him by the attorneys of the creditor in which they notified him that unless he settled the judgment they should instruct the sheriff to advertise his property for sale. And, again, he was notified by letter that unless he paid the judgment the sheriff would be directed to sell him out on execution. His only answer to all this information which was conveyed to him is that he had gone to a lawyer to have the judgment opened and supposed that the lawyer was taking care of him, and that the lawyer had told him not to do anything. There is no attempt to secure the evidence of the lawyer, nor is there any corroboration of what the complainant testifies to in this respect, nor does he specifically testify that the lawyer was taking any proceeding after he attempted to open the judgment (in which attempt he failed) to further stay the due process of law, or to

interfere with the judgment creditor taking the proper steps to collect his judgment. Nor does it appear that the judgment debtor, when he received the numerous notices that he did that his property would be sold, consulted the lawyer, as it was his duty to do if it was true that the lawyer had been retained to protect him, or that he called these communications to his lawyer's attention, or himself paid any attention to them whatever.

I cannot find, therefore, in this case what Chancellor Zabris-
kie found in the *Kloepping Case*, namely, that the defendant believed that the property would not be sold; in fact I think that he must have believed, if he was capable of receiving any impression and of having any mental operations whatever, that unless he paid the debt his property would be sold.

I do not, therefore, think that it would be proper or in keeping with the due administration of law to relieve a judgment debtor, under the circumstances disclosed in this case, from the consequences of his own negligence and carelessness. I do not think it would be proper to hold that he was, legally speaking, under any mistake or misapprehension. That the negligence or carelessness of his attorney, if there was any such, must be attributed to him is too well settled to require discussion. The citations will be found collected in *16 Am. & Eng. Encycl. L.* (2d ed.) 392.

Even if there was proof—which there is not in this case—that the property was sacrificed, I do not think it is a proper case in which to extend the aid of this court. If it is a proper case, then I cannot conceive of any case in which a sheriff's sale under an execution at law could stand if the defendant asserted that he did not have belief that the property would be sold, and I am sure that to extend the jurisdiction so as to produce this result is not in keeping with the spirit animating this court with respect to this subject.

The courts have frequently called attention to the necessity of having sheriffs' sales or judicial sales upheld unless there is some strong reason for setting them aside, and have pointed out that the purchaser at an official sale becomes invested with a fixed and definite legal right, of which he should not be deprived except upon some legal or equitable ground. *Chamberlain v.*

2 Buch.

Fidelity and Casualty Co. v. MacAfee Co.

Larned, 32 N. J. Eq. (5 Stew.) 295 (*Court of Errors and Appeals*, 1880); *Morrisse v. Inglis*, 46 N. J. Eq. (1 Dick.) 306 (*Court of Errors and Appeals*, 1889); *Bethlehem Iron Co. v. Philadelphia and Seashore Railway Co.*, 49 N. J. Eq. (4 Dick.) 356 (*Chancellor McGill*, 1892); *Hunt v. Swayze*, 55 N. J. Law (26 Vr.) 33 (*Supreme Court*, 1892); *Zimmerman v. Place*, 61 N. J. Eq. (16 Dick.) 273 (*Chancellor Magie*, 1901); *Ryan v. Wilson*, 64 N. J. Eq. (19 Dick.) 797 (*Vice-Chancellor Reed*, 1902).

There are many jurisdictions in which one whose land has been sold by judicial process has a certain length of time within which to redeem the same. This right is created and regulated by statute. There is no such statute in New Jersey. The court cannot legislate. The complainant herein, in my view of the circumstances and the law, is seeking nothing more or less than the right to redeem. He does not show any existing equity, but does disclose a situation which demonstrates, perhaps, the advisability of the creation of a new equity, namely, the right to redeem property sold by judicial process. I cannot find any authority in our law establishing any such right.

I will advise an order denying the motion for a preliminary injunction.

FIDELITY AND CASUALTY COMPANY

v.

THE MACAFEE COMPANY.

[Decided February 1st, 1907.]

P. L. 1896 p. 300 provides that the receiver of a corporation shall have power to send for persons, and to examine them on oath respecting the corporation's affairs, and that if any person shall refuse to be sworn, the court of chancery may, on report of the receiver, commit such person to

prison.—*Held*, that where service of a summons was made by the receiver on a person without the state, the courts of the state had no authority to make an order adjudging such person in contempt for failing to appear.

Proceedings on behalf of the receiver of the defendant company to punish John B. MacAfee as for a contempt. Heard on petition of receiver and proofs attached thereto.

By a final decree in this court, entered on the 18th day of June, 1906, the above-named defendant was in this suit decreed to be insolvent, and an injunction in pursuance of the statute was issued against it and its officers, and a receiver was appointed for it.

John B. MacAfee was at that time the president of the defendant corporation.

On the 26th day of October, 1906, the receiver caused to be served, in the city of Philadelphia, in the State of Pennsylvania, upon said John B. MacAfee personally, a summons or notice in the nature of a subpoena, requiring the said John B. MacAfee to appear before the receiver, at 127 Market street, Camden, New Jersey, on the 1st day of November, 1906, at the hour of eleven o'clock in the forenoon, to be examined, on oath or affirmation, respecting the affairs and transactions and estate, money, goods, chattels, credits, notes, bills and choses in action, real and personal estate and effects of every kind of the MacAfee Company, * * * and also respecting its debts, obligations, contracts and liabilities, and the claims against it, and then and there to produce before the said receiver the minute-book and the stock and transfer-books of said corporation, and all papers and documents of whatever sort in the possession of the said John B. MacAfee, or under his control, relating to the stock issue of said corporation, the terms thereof and the disposition thereof and the payment therefor; also all papers and documents of whatever sort showing or relating to the incorporation and organization of said corporation and the purchase of property by it; also the day-book, journal, ledger, bank-book or books, vouchers, and all other books, papers and records relating to the organization, business, property and affairs of said corporation.

2 Buch.Fidelity and Casualty Co. v. MacAfee Co.

It is recited therein that

"this summons is served upon you pursuant to the power in me vested as receiver of the MacAfee Company, an insolvent corporation, by virtue of the laws of the State of New Jersey, and particularly section 71 of an act of the legislature of the State of New Jersey entitled 'An act concerning corporations' (Revision of 1896)."

Said section reads as follows:

"Such receiver shall have power to send for persons and papers, and to examine any persons, including the creditors and claimants, and the president, directors and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions, and its estate, money, goods, chattels, credits, notes, bills and choses in action, real and personal estate and effects of every kind, and also respecting its debts, obligations, contracts and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as shall be put to him, or refuse to declare the whole truth touching the subject-matter of the said examination, the court of chancery may, on report by the receiver, commit such person to prison, there to remain until he shall submit himself to be examined, and pay all the costs of the proceedings against him."

On the 1st of November, 1906, at the time and place aforesaid, the said John B. MacAfee did not appear. Thereupon the receiver, on the 24th of December, 1906, filed what is termed a petition, but what may as well be termed a report under the language of the section just quoted, and in the said paper prayed that an order might be made adjudging the said John B. MacAfee in contempt, and that he be punished therefor.

An order to show cause why the prayer of this petition should not be granted was, on the date of the filing of the petition, made, and on the 27th day of December, 1906, a true copy thereof was served upon the said John B. MacAfee personally, in the city of Philadelphia and State of Pennsylvania. That order was returnable on the 31st day of December, 1906. Upon the return day the court was attended by counsel for the petitioner and by Messrs. Collins & Corbin, who, with the permission of the court, entered a special appearance for John B. MacAfee, restricting their appearance to objecting to the jurisdiction of the court to grant the prayer of the petition aforesaid.

Fidelity and Casualty Co. v. MacAfee Co.

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Mr. John M. Enright, for the petitioner.

Messrs. Collins & Corbin, for John B. MacAfee.

GARRISON, V. C. (after stating facts).

I am of opinion that this court is without jurisdiction to make the order prayed for in this proceeding.

It will be observed that the statute provides that

"if any person shall refuse to be sworn or affirmed * * * the court of chancery may, on report by the receiver, commit such person to prison, there to remain until he shall submit himself to be examined, and pay all the costs of the proceedings against him."

While this proceeding is not exactly in conformity with the statute, I am of opinion that it is sufficiently so to raise the question whether, under this act and the proceedings in this case, the person named may, by the order of this court, be ordered to be committed to prison, &c.

Without considering the constitutionality of the seventy-first section of the Corporation act, which is quoted in full in the above statement of facts, it is clear that the power thereby vested in the receiver is not and cannot be any broader than the analogous power vested in the courts of the highest primary jurisdiction in the state.

The process to compel the attendance of witnesses in those courts is ineffectual unless served upon the person within the territorial limits of the state. *State v. Trumbull*, 4 N. J. Law (1 South.) 139.

I cannot perceive how the process which the receiver may issue under the cited section of the Corporation act can have any other or greater effect than the similar process of the courts just adverted to.

Since the summons, notice or subpoena issued by the receiver in this suit was not served within the territorial limits of this state, this court is without the power to commit the person upon whom the same was served outside of the territorial limits of this jurisdiction.

2 Buch.McKiernan v. Beardslee.

This determination rests upon such elemental principles of our law that I deem it unnecessary to cite authorities or precedents, or to indulge in further reasoning concerning the situation.

The prayer of the petition will be denied.

SAMUEL G. MCKIERNAN et al., executors, &c., of John McKiernan, deceased, and individually,

v.

ELIZABETH BEARDSLEE (or BEARDSLEY) et al.

[Decided November 1st, 1906.]

In the absence of any clause or expression in a will showing an intent to the contrary, a devise or bequest from a wife to a husband "to him and his heirs forever," lapses upon the death of the husband in the lifetime of the testatrix; the words "heirs forever" being words of limitation and not of substitution.

On bill, &c.

Mr. George S. Hilton, for the complainants.

Mr. Abram Klenert, for the defendants.

LEAMING, V. C.

The will of Emeline A. Doremus contained the following provision:

"After the payment of all my just debts and funeral expenses, I give, bequeath and devise all my property, both real and personal, wheresoever situate, and whatever the same may be to my husband, Cornelius Doremus, of the city of Paterson, in the county of Passaic and State of New Jersey, to him and his heirs forever."

Cornelius Doremus, the devisee and legatee named in the will, died April 1st, 1899.

Emeline A. Doremus, the testatrix, died November 10th, 1904.

The sole question for determination is whether the devise and bequest lapsed by reason of the husband predeceasing his wife, or whether the heirs of the husband take the estate which the husband would have received under the will in the event of the husband having survived testatrix.

It is well settled that a devise or bequest to "A and his heirs" lapses upon the death of A in the lifetime of the testator, the word "heirs" being a word of limitation which is used to denote the quality or duration of the estate to be taken by the devisee or legatee, and not a word of substitution denoting an intention to substitute the next of kin in the place of the deceased devisee or legatee. The rule is the reverse in the case of a devise or bequest to "A or his heirs" for the reason that in such case there is an apparent intention of substitution. If an intention to substitute the next of kin in the place of the deceased devisee or legatee, so as to save a lapse, can be deduced from some other clause or expression in the will, the rule above stated may be overcome. *Zabriskie v. Huyler*, 62 N. J. Eq. (17 Dick.) 697; *affirmed on appeal*, 64 N. J. Eq. (19 Dick.) 794.

In the present case the portion of the will above quoted constitutes the entire will, except a clause appointing the executor, and no intention can be imputed other than that manifest from the language of the clause quoted.

The word "forever" in the devise and bequest in question imports no more than that the person who is to take shall take absolutely, and does not alter the character of the person who is to take. *Doody v. Higgins*, 9 Hare 32 (*Appendix *XXXII*).

Gen. Stat. p. 3763 § 34, making provision against the lapse of estates devised or bequeathed, does not extend to a devise or bequest to the husband of testatrix. *Canfield v. Canfield*, 62 N. J. Eq. (17 Dick.) 578.

I will advise a decree accordingly.

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PUBLIC SERVICE CORPORATION OF NEW JERSEY.

v.

HACKENSACK MEADOWS COMPANY.

[Decided November 1st, 1906.]

1. A court of equity will not decree the specific performance by vendor of a contract for the sale of land where the vendor is not the owner of the land which he has agreed to convey. Such decree will not be made even though it is within the power of vendor to purchase the land in question at a reasonable price.

2. A court of equity will not retain a bill for specific performance for the purpose of awarding damages to vendee if the bill was filed by vendee at a time when he knew that defendant was not owner of the land in question.

On demurrer to bill.

The bill alleges that defendant agreed to sell to the North Jersey Street Railway Company a certain strip of land and to convey an absolute title to the same for the consideration of \$30,000. Subsequently the railway company, with the consent and acquiescence of defendant, assigned the contract of sale to complainant and complainant entered into possession under the contract. Thereafter defendant executed and delivered to complainant a deed of conveyance of the land contemplated by the contract and received from complainant the money consideration named in the contract. The deed contains a covenant of ownership, a covenant of right to convey and a covenant of general warranty. Complainant has erected upon the land in question poles and transmission wires for conveying electricity, that being the purpose for which the land was purchased. Complainant relied upon the declarations of ownership of defendant at the time the purchase and improvements were made. At the time of the conveyance a certain portion of the premises conveyed was owned by one Ella V. Decker, and in consequence no

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title to that portion passed to complainant by the conveyance. Complainant is now in possession of the portion of the premises in question solely by sufferance of Ella V. Decker. The bill then contains the following paragraph:

"That the said Ella V. Decker is ready and willing to sell for a reasonable price a tract of land containing four and ninety-one hundredths (4.91) acres, of which the land so agreed to be conveyed but not properly conveyed to your orator, is a part; but that your orator has use only for a strip eighty (80) feet wide across said tract of 4.91 acres, as above described, and it would be a grievous burden to your orator to be compelled to acquire said entire tract; that Hackensack Meadows Company is the owner of other land in that vicinity, is dealing in land in that vicinity, and could without loss to itself, acquire at a reasonable price from Ella V. Decker the tract of land in question and convey to your orator that portion of the same agreed to be conveyed to your orator as aforesaid; that your orator has repeatedly requested Hackensack Meadows Company to execute its agreement to convey the said land to your orator by a good and sufficient title as it well could do, and the said Hackensack Meadows Company has on several occasions, promised to arrange the matter and acquire the said land from Ella V. Decker and convey the same to your orator, but that a reasonable time has elapsed since such requests were made by your orator, and Hackensack Meadows Company has not carried out its agreement to convey the said portion of said land to your orator, although the said Hackensack Meadows Company retains the full consideration paid by your orator, to wit: the sum of thirty thousand dollars (\$30,000) for all of said lands so conveyed; all of which is contrary to equity and good conscience and tends to the manifest wrong and injury of your orator."

The bill prays, in addition to the prayer for general relief, that the agreement of conveyance may be specifically performed, and that defendant may be required within a reasonable time to acquire the title to that portion of the premises owned by Ella V. Decker and then convey the same to complainant. Ella V. Decker is not made a party.

Mr. Leonard J. Tynan, for the complainant.

Mr. Thomas Mills Day, for the demurrant.

LEAMING, V. C.

This court has repeatedly held that it will not decree the specific performance by a vendor of a contract for the sale of

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land where the vendor is not the owner of the land which he has agreed to convey. *Welsh v. Bayaud*, 21 N. J. Eq. (6 C. E. Gr.) 186; *Peeler v. Levy*, 26 N. J. Eq. (11 C. E. Gr.) 330; *Ten Eyck v. Manning*, 52 N. J. Eq. (7 Dick.) 47; *Hopper v. Hopper*, 16 N. J. Eq. (1 C. E. Gr.) 147, 149. It is urged on behalf of complainant that the underlying reason for the refusal to decree specific performance in such cases will be found to rest in the inability of the court to enforce such decrees and its reluctance to make nugatory decrees, and upon that view it is argued that the present case is free from the operation of the rule in that the bill avers that defendant can acquire title to the land in question at a reasonable price, and this fact being admitted, it is urged that no embarrassment in the execution of the decree can be reasonably anticipated. In this contention I think that counsel of complainant fails to give full force to the reasons for the rule in question. While in the cases above cited decrees may seem to have been refused because of their manifest want of inherent coercive force, yet that does not appear to be the sole ground upon which equity is impelled to deny relief in such cases. It is a well-established rule in equity that no contract will be specifically enforced unless there is in the contract such mutuality of obligation that either party may enforce it against the other. As a vendor without title to the subject-matter of the contract of sale cannot enforce the contract against his vendee, or at least cannot until he shall have actually acquired title, courts of equity hold such contracts unenforceable at the instance of the vendee because of want of mutuality as well as because of the possible infirmity of the decree. *Forrer v. Nash*, 35 Beav. 167; *Hoggart v. Scott*, 1 Russ. & M. 203; see, also, *Ten Eyck v. Manning*, *supra*; *Pom. Spec. Perf.* §§ 162, 166. I think another ground upon which courts of equity appropriately refuse to decree specific performance in cases of this class arises from the mutual relationship which equity deems the respective parties to bear to the subject-matter of the contract. Under an agreement for the sale of land equity regards the vendee as the equitable owner of the land and the vendor as the equitable owner of the purchase-money. The vendor holds the legal estate in trust for the vendee. The lands descend to the heirs of the vendee and the personal

representatives of the vendor succeed to the purchase-money. A sale by the vendor to a third party will be treated in equity as a sale for the benefit of the vendee and an accounting will be decreed. A third party purchasing with notice of the contract will be compelled to convey to the vendee. In *Haughwout & Pomeroy v. Murphy*, 22 N. J. Eq. (7 C. E. Gr.) 531, 547, Mr. Justice Depue, in delivering the opinion of our court of errors and appeals, after reviewing the above-stated effects of the contract of sale upon the title of the subject-matter of the contract, says: "It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends." The absence of an equitable estate in the vendee, when the subject-matter of the contract to convey is land in which the vendor has no interest, would seem to necessarily enter largely into the considerations which have impelled courts of equity to uniformly refuse to entertain bills for the specific performance of such contracts. It should also be observed that a decree of specific performance against a vendor where he has no title, but has merely the means of acquiring a title by purchase, would be no less barren, except in its persuasive force, than such a decree where no present means of acquiring title should exist. With title in vendor this court can, if necessary, direct a conveyance through commissioners and effectuate its decree to its fullest purpose. This, however, could not be accomplished with title in another. Such a decree would fail in the important element that goes far to induce courts of equity to adopt the extraordinary remedy sought by complainant. My conclusion is that the fact that it is now possible for defendant to acquire title to the land in question at a reasonable price will not justify this court in entertaining the bill. I see nothing in *Moore v. Crawford*, 130 U. S. 122, 133, cited in behalf of complainant, to modify this view.

Complainant further urges that the allegation in the bill, to the effect that since the delivery of the deed defendant "has promised to arrange the matter and acquire the said land from Ella V. Decker and convey the same" to complainant, creates

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further or additional rights to relief. No new consideration for the promise is averred. Such promise is plainly without a consideration to support its enforcement and bestows no additional remedy.

The bill will not be retained for the purpose of awarding damages. The bill was filed for specific performance at a time when complainant knew that defendant was not owner of the land in question. The distinctive claim for equitable relief failing this court will not, in such case, take jurisdiction of the ancillary claim to damages. *Borden v. Curtis*, 48 N. J. Eq. (3 Dick.) 120; *Peeler v. Levy*, 26 N. J. Eq. (11 C. E. Gr.) 330, 332; *Welsh v. Bayaud*, 21 N. J. Eq. (6 C. E. Gr.) 186; *Iszard v. Mays Landing Water Power Co.*, 31 N. J. Eq. (4 Stew.) 511, 524; *Ludlum v. Buckingham*, 35 N. J. Eq. (8 Stew.) 71; *S. C.*, 39 N. J. Eq. (12 Stew.) 563.

The bill will be dismissed, with costs.

THE STATE, EX REL. THE BOARD OF HEALTH OF THE STATE
OF NEW JERSEY,

v.

BOROUGH OF VINELAND.

[Decided November 13th, 1906.]

1. The principle upon which subsequent legislation will operate to repeal prior legislation, without an express repealing clause, is, that where there are two acts on the same subject effect will be given to both, if possible. If the two acts are repugnant in any of their provisions, the later act operates to repeal the earlier to the extent of the repugnancy. Where two acts are not in express terms repugnant, if the later act covers the whole subject of the earlier act, and embraces new provisions, plainly showing that it was intended as a substitute for the earlier act, it will operate to repeal that act.

2. The provisions of chapter 41 of the laws of 1899 (*P. L. 1899 p. 73*), authorizing the state board of health to enjoin the pollution of potable waters, held to be repugnant to and repealed by chapter 72 of the laws of 1900 (*P. L. 1900 p. 113*) in cases where the alleged pollution occurs by reason of the operation of a municipal sewer plant constructed and operated under and pursuant to the directions of the state sewerage commission appointed under the latter act.

3. Semble, chapter 41 of the laws of 1899 (*P. L. 1899 p. 73*) is wholly repealed by chapter 72 of the laws of 1900 (*P. L. 1900 p. 113*).

On final hearing on bill, answer, replication and proofs.

Mr. Robert H. McCarter, attorney-general, for the complainant.

Mr. Herbert C. Bartlett, for the defendant.

LEAMING, V. C.

The bill in this cause is filed by the attorney-general at the relation of the state board of health, under the provisions of chapter 41 of the laws of 1899 (*P. L. 1899 p. 73*), to restrain the borough of Vineland from discharging the effluent of the filtration beds of its municipal sewer system into the waters of Tarkiln branch, a tributary of Maurice river.

It is contended upon the part of defendant that the provisions of the act referred to are repealed by subsequent legislation. As the jurisdiction of this court in this case is dependent upon the provisions of that act, which by its terms confers upon this court a special statutory jurisdiction in this class of cases (*State, ex rel. Board of Health of New Jersey, v. Diamond Paper Mills, 63 N. J. Eq. (18 Dick.) 111; S. C. on appeal, 64 N. J. Eq. (19 Dick.) 793*), it is manifest that if subsequent legislation has operated to effect a repeal of the act in question the bill in this cause must be dismissed.

The principle upon which subsequent legislation will operate to repeal prior legislation without an express repealing clause has been frequently considered by the courts of this state and is well defined. Where there are two acts on the same subject, the rule is to give effect to both, if possible. If the two acts are

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repugnant in any of their provisions, the later act operates to repeal the earlier to the extent of the repugnancy. Where two acts are not in express terms repugnant, if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the earlier act, it will operate as a repeal of that act. *McNeely v. Woodruff*, 13 N. J. Law (1 Gr.) 352, 356; *Naylor v. Field*, 29 N. J. Law (5 Dutch.) 287; *McGavisk v. State, Morris and Essex Railroad Co.*, 34 N. J. Law (5 Vr.) 509, 511; *Industrial School District v. Whitehead*, 13 N. J. Eq. (2 Beas.) 290; *Ruckham v. Ransom*, 35 N. J. Law (6 Vr.) 565; *Morris and Essex Railroad Co. v. Commissioner of Railroad Taxation*, 37 N. J. Law (8 Vr.) 228, 230; *S. C.*, 38 N. J. Law (9 Vr.) 472; *State v. Chambersburg*, 37 N. J. Law (8 Vr.) 258, 260; *Landis v. Landis*, 39 N. J. Law (10 Vr.) 274, 277; *State, North Ward National Bank, v. Newark*, 39 N. J. Law (10 Vr.) 380, 391; *Roche v. Jersey City*, 40 N. J. Law (11 Vr.) 257, 259; *Mulligan v. Cavanagh*, 46 N. J. Law (17 Vr.) 45, 49; *Bowyer v. Camden*, 50 N. J. Law (21 Vr.) 87; *Haynes v. Cape May*, 52 N. J. Law (23 Vr.) 181; *DeGinther v. New Jersey Home*, 58 N. J. Law (29 Vr.) 354, 357; *Anderson v. Camden*, 58 N. J. Law (29 Vr.) 515, 521; *Camden v. Varney*, 63 N. J. Law (34 Vr.) 325, 329; *Bracken v. Smith*, 39 N. J. Eq. (12 Stew.) 169, 171; *Mersereau v. Mersereau*, 51 N. J. Eq. (6 Dick.) 382, 385; *Hotel Registry Corporation v. Stafford*, 70 N. J. Law (41 Vr.) 528, 537.

The act under which this proceeding is brought is entitled "An act to secure the purity of public supplies of potable waters in this state," and was approved March 17th, 1899. The first section of this act forbids any sewage or other polluting matter, which will corrupt or impair or tend to corrupt or impair the quality of the water into which it is discharged, or which will render or tend to render such waters injurious to health, to be placed or discharged into any stream or tributary or branch thereof, from which is taken, or may be taken, any public supply of water for domestic use in any municipality, above the point from which any such municipality shall or may obtain its supply of water for domestic use. A proviso exempts from the opera-

tion of the act any municipality which, at the date of the passage of the act, has a public sewer system, legally constructed under public authority, discharging its sewage into any such stream. A penalty of \$100 is provided for each violation of the provisions of the act, and each week's continuance, after notice by the state or local board of health to abate or remove, is made a separate offence. The second section of the act provides a summary proceeding for the recovery of the penalties in an action by either the state board of health or the local board. The third section gives to the state board of health the general supervision, with reference to their purity, of all rivers, brooks, streams, &c., the waters of which are or may be used as the source of public supplies for domestic use. The fourth section provides that, instead of proceeding to recover the penalty named in the first section, the state board of health may, through the attorney-general, at its relation, file a bill in chancery to enjoin the violation of the provisions of the first section of the act.

At the same session of the legislature an act was passed entitled "An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards, and prescribing, defining and regulating the powers and duties of such commission and such boards." *P. L. 1899 p. 536*. This act was approved March 24th, 1899. This latter act was amended in 1900 (*P. L. 1900 p. 113*) by a re-enactment of the entire act with some minor changes and several important additions. The amendatory act defines the full scope of purpose of the legislature, and any legislative intention to supersede and annul the operation of the act of March 17th, 1899, will be found in this amendatory act. This act retains the state sewerage commission created by and appointed under the act of March 24th, 1899, and increases the salary of its members and removes the limitation upon the annual appropriation to cover the expenditures of the commission. It makes it the duty of the state sewerage commission to investigate the various methods of sewage disposal to enable it to make proper recommendations and to investigate all complaints of pollution of waters which shall be brought to its notice, and if the commission find that

any of the waters of the state are being polluted to the injury of any inhabitants of this state, either in their health, comfort or property, it is made its duty to give notice to the person or municipality so polluting the waters to cease within a time to be fixed by the commission not exceeding five years, and to make, within the time fixed, such disposition of the sewage or other polluting matter as shall be approved by the commission, and any failure to obey such finding of the commission is made unlawful. Any person or municipality aggrieved by the finding of the commission is given an appeal to the court of chancery, which court is empowered by the act to affirm the finding of the commission or to reverse or modify such finding in whole or in part. The act makes it unlawful for any person or municipality to build any sewer or drain from which it is designed that any sewage or other harmful matter, solid or liquid, shall flow into any of the waters of this state so as to pollute or render impure said waters, except under such conditions as shall be approved by the commission, and makes it unlawful for any person or municipality to build or operate any plant for the treatment of sewage or other polluting substance, from which the effluent is to flow into any of the waters of this state, except under such conditions as shall be approved by the commission to whom any new plans must be submitted before building. The act further provides that the commission may apply to the court of chancery for an injunction to prevent the violation of the provisions of the act, and it is made the duty of the court of chancery to restrain violations in such cases. The act also makes elaborate provisions for the formation of sewerage districts embracing two or more municipalities for the establishment of sewerage systems, which may include the scientific treatment of sewage and sewage matters and the effluent thereof, the initiatory proceeding being a petition to the commission, followed by a public hearing and a final order of the commission creating the district and defining its boundaries. Such sewerage districts, after the election and organization of their officers, are made bodies corporate, with power to sue and be sued, purchase and condemn property and issue bonds and to construct and operate sewerage systems within the created districts, but at all times

under the supervision and control of the state sewerage commission. The waters of this state, as defined by the act, do not include the ocean or any waters separating this state from any other, unless such waters are used for potable purposes.

This summary of the provisions of the two acts is deemed to be complete enough to disclose their relative scope and purpose. It will be seen that the purpose of the latter act, as is stated in its title, is to prevent the pollution of the waters of this state by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards. With the primary aim to prevent the pollution of the waters of this state the act appears to have adopted, or undertaken the adoption of, a complete and self-sufficient scheme to the accomplishment of that end. In the purposed accomplishment of that end the provisions of the act seem to cover the entire scope and operation of the earlier act. A state sewerage commission is created with broad and comprehensive powers and duties which appear to be not only appropriate but ample to meet and eradicate all conditions which may occasion water pollution within the state. The earlier act is not operative against municipalities with sewer systems which existed at the date of the passage of the act; the later act includes not only a means for their correction, but also a complete means for the prevention of future contamination, existing evils being corrected through the means provided in section 5 of the act, and new pollutions being prevented by the provisions of sections 6, 7 and 8. The waters brought under the protection of the later act include all the waters within the contemplation of the earlier act and other waters as well, the earlier act being limited to potable waters. A special statutory jurisdiction is given to this court by the later act to prevent by injunction all violations of the act; this provision is essentially the same as a corresponding provision in the earlier act. The only feature I find in the earlier act which may be said to be in any sense broader than the later act is that the former act forbids pollution (except as to municipalities with sewer systems already constructed) in any event and irrespective of whether or not injury is sustained, whereas the later act guards against pollutions by giving to

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the state sewerage commission supervision and control of the methods of construction and operation of all works and permitting no works to be constructed or operated except under such conditions as shall be approved by the commission, thereby leaving the possibility that the commission may, through error of judgment, permit the operation of imperfect works. This difference in the two acts would seem to be the basis of the present litigation, for by the proofs it appears that the works of defendant municipality were constructed and are being operated pursuant to the consent and approval of the state sewerage commission, and complainant's contention is that notwithstanding that fact potable waters are being polluted through the operation of these works. It appears manifest, however, that in the enactment of the amended sewerage act now under consideration the legislature intended to bestow upon the state sewerage commission the power and duty to fully supervise and control the entire subject of pollution of public waters occasioned by the discharge of sewage, drainage or other polluting matter into such waters and the power and duty to prevent such pollution, and this manifest legislative purpose clearly negatives any possible legislative intent to preserve to the state board of health the right to enjoin the operation of works which have been constructed and are being operated pursuant to the consent and directions of the state sewerage commission. Any conception that the legislature intended to preserve to the state board of health the powers contended for includes the assumption that the state sewerage commission would fail in the performance of the duties imposed upon it, and is not to be entertained. It necessarily follows that the provisions of the earlier act, in so far as they may seem to authorize the state board of health to maintain an action of the nature of the present one against a municipality operating a sewage disposal plant which has been constructed and is being operated pursuant to the consent and directions of the state sewerage commission, are repugnant to the provisions of the earlier act, and, in consequence, repealed to that extent at least. More than this it is unnecessary for me to decide in this case, but I entertain the view that the legislative intent was to adopt

an entirely new system for the protection of the public waters of the state and to substitute the provisions of the new act for those of the old originally designed for the same purpose, and that the later act operates to repeal the earlier act in its entirety.

The conclusion I have reached renders a discussion of the testimony unnecessary. I may say, however, that the testimony (which was taken before my predecessor in office and transcribed for my use) does not lead me to the conclusion that the fact is satisfactorily established in this cause that the effluent of defendant's works corrupts or impairs or tends to corrupt or impair the waters into which it is discharged. The testimony touching this disputed fact is almost wholly that of chemists and bacteriologists. It appears to be accepted as a scientific fact that pathogenic organisms, like typhoid germs, cannot be estimated, but that the recognized method of ascertaining whether or not any pathogenic organisms exist in water is to ascertain by certain recognized bacteriological tests the presence or absence of bacillus coli communis. If coli are found to exist in considerable numbers the conditions are believed to be conducive to the propagation of pathogenic organisms. The coli are, in themselves, harmless, and the number that may safely exist in water is not entirely certain; one thousand coli to the cubic centimeter is believed to disclose a dangerous condition of the water. The testimony in behalf of complainant is that of Dr. Raymond B. Fitz-Randolph, a chemist and bacteriologist, who made chemical analyses of water taken from the effluent February 20th, 1905, April 24th, 1905, and November, 1905, and a chemical analysis and bacteriological examination of water taken from the effluent January 21st, 1906. This witness pronounces the effluent impure and claims to have discovered the presence of coli in a dangerous degree in the bacteriological examination made of the water taken January 21st, 1906. Four scientific experts who have made numerous examinations of the effluent—some chemical and some bacteriological—testified in behalf of the defence in opposition to the testimony of Dr. Fitz-Randolph. Some of these witnesses have given a great amount of time to the examination of the effluent at various periods and to personal examinations of the operation of the works. These

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witnesses entertain the view that the waters flowing from the filtration beds are pure and do not contaminate or tend to contaminate the waters of Tarkiln branch into which they flow. In view of the testimony in behalf of defendant, I do not think that a conclusion could be justified to the effect that defendant is violating either the letter or spirit of the statute under which this cause is brought. It is admitted that the effluent has a disagreeable odor. This odor is explained to exist by reason of suspended but harmless gases which disappear when the effluent is discharged. The testimony also discloses that the filtration works of defendant municipality are constructed and operated under the most approved modern system, and a perusal of the testimony goes far to satisfy me that if the works in question fall short of accomplishing a degree of purification which will permit their operation under the terms of the earlier act there is little hope of any sewer filtration works being successfully operated if that act should be held to be still operative. I make this appended suggestion by reason of the fact that section 12 of the Sewerage Commission act of 1900 contemplates the operation of sewage disposal works for the scientific treatment of sewage matter and the effluent thereof. I will advise a decree dismissing the bill, with costs.

DEFIANCE FRUIT COMPANY

v.

THOMAS C. FOX.

[Decided November 22d, 1906.]

1. The bill averred that defendant maintained a mill-dam which caused backwater to overflow complainant's cranberry bogs. The answer denied that the dam occasioned the overflow of complainant's land and also set up a prescriptive right to maintain the dam as it was.—*Held*, that the court of chancery is without jurisdiction to try these issues.

2. The bill is retained to enable complainant to establish its right at law because the answer failed to deny the jurisdiction of the court, and the bill sought mandatory relief which could be appropriately granted after complainant's right at law should be established.

On bill for injunction.

The bill in this cause is filed to procure an injunction to restrain defendant from backing water, by means of a dam, upon complainant's lands, and to compel defendant to remove the dam. The bill alleges that complainant is the owner of land on either side of an ancient water course called "Scotland Branch." That complainant's land, adjacent to the water course, is in use as a cultivated cranberry bog which requires the use of the stream in its natural condition for drainage. That defendant has for a great many years maintained a dam across the water course at a point below complainant's land for the purpose of obtaining water power with which to operate his mill, and has recently raised the level of the pond formed by the same so that the water backs up and overflows complainant's land and cranberry bogs causing complainant irreparable injury, and that defendant threatens to raise the water even higher.

The answer denies any knowledge as to complainant's ownership of the land in question, and denies that defendant has at any time raised the level of the water so that it backs up to complainant's land or injures it or the cranberry bogs, and denies any threats or intention upon defendant's part to raise the water higher, and avers that any excess of water at complainant's land is caused by improper discharge of water from a mill-dam on the same stream above complainant's land and also by clogging of the channel of the stream at and below complainant's lands. The answer further avers that the dam of defendant and the waters held by the dam have been maintained by defendant as they now are for more than twenty years continuously next preceding the filing of the bill.

Mr. George J. Bergen and Mr. John W. Wescott, for the complainant.

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Mr. Henry S. Alvord, for the defendant.

LEAMING, V. C.

This cause coming on for final hearing I have, on my own motion, declined to proceed further until complainant shall have established his rights at law.

It is, in this state, well settled that this court will not adjudicate controversies of this class unless defendant's misconduct shall be admitted or shall have been established at law against him. The present case is essentially similar to *Outcalt v. George W. Helme Co.*, 42 N. J. Eq. (15 Stew.) 665. The complainant's right to relief is not admitted, and cannot be made clear until the defendant's averments are overthrown, and there is in this case no other circumstance to warrant the interposition of a court of equity before the right is established at law. Complainant relies upon *Carlisle v. Cooper*, 21 N. J. Eq. (6 C. E. Gr.) 576. In that case the legal right of complainant was admitted, and the object of the bill was to ascertain the extent of the right and to protect it in a manner not attainable by legal procedure.

There is in the present case, however, one element of which this court may take cognizance. I refer to the allegation of the bill that defendant has threatened to raise the water higher than it now is or has been. The answer denies such threat and disclaims such purpose, and makes no claim of right to raise the water higher than its present level. The issues as presented may be said to admit the right of complainant to protection against a higher level of the water. If, therefore, complainant desires to proceed to establish the fact that defendant threatened and at the date of the filing of the bill intended to raise the level of the water to the injury of complainant the cause may proceed to hearing at once on that issue alone, otherwise the cause will be held in its present condition until complainant shall have had a reasonable time to establish its right at law.

I shall hold the cause and not dismiss the bill for the reason that the answer in no way denies the jurisdiction of this court as to the matters in which I hold this court is without jurisdiction, and also because one object of the bill is to secure affirma-

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tive relief to remove the obstruction, a relief which can be appropriately adjusted in this cause should complainant succeed in the establishment of its right at law. See *Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507.

AMY A. VAN DYKE

v.

FREDERICK A. VAN DYKE et al.

[Decided November 26th, 1906.]

1. A bill may be filed in the chancery court for the recovery of a legacy or distributive share, either before or after a settlement in the orphans court.

2. An action at law to recover a distributive share of an estate is purely statutory, and can be maintained only after a decree of distribution.

3. The action at law to recover a distributive share of an estate given by statute is a remedy in addition to that existing in equity, and in no way limits or qualifies the jurisdiction of the chancery court.

4. A bill by one who is next of kin against an administrator and the sureties on his bond, specifically praying for an ascertainment of complainant's distributive share, justifies a decree for the payment of the amount, when ascertained, under the prayer for general relief, and the bill is not defective because of the absence of a specific prayer for payment.

5. A bill by an heir as next of kin against the administrator to determine the amount of her distributive share, alleged fraud in the accounts filed in the orphans court, and sought, by specific interrogatories, to ascertain information as to certain securities which had come into defendant's hands, and asked that defendant set forth the several items of assets and disbursements.—*Held*, that the fact that the accounts had been settled in the orphans court, and that complainant participated in the settlement, does not exonerate defendant from answering the interrogatories and from setting forth the accounts.

On motion to strike out each paragraph of the answer, and also the entire answer.

2 Buck.**Van Dyke v. Van Dyke.**

The bill is filed by Amy A. Van Dyke as one of the next of kin of Sarah E. Buck, deceased, against the administrators of Sarah E. Buck, deceased, and their sureties, to determine the amount of the distributive share of the personal estate of intestate to which complainant is entitled as such next of kin.

The bill avers that administration has been pending in Atlantic county orphans court since the year 1900; that defendant Frederick A. Van Dyke, one of the administrators, has possessed himself of almost all of the personal estate of intestate to the exclusion of his coadministrator; that the estate could have been easily settled within a year from the decease of intestate, but that the administrator named has wasted and squandered the estate and complainant's only means to obtain her distributive share is by action on the administrator's bond, to which action a determination of her share is a prerequisite; that to vex, delay and hinder complainant from the discovery of her share, administrator Frederick A. Van Dyke has filed in the orphans court fraudulent and deceitful statements of receipts and disbursements of moneys, which statements are fraudulently and cunningly devised to make it appear that complainant has no interest. The bill also contains a series of interrogatories touching specified securities, and asks that defendants set forth the several items of assets received, including those from a foreign jurisdiction, together with the items of all disbursements made in both this and the foreign jurisdiction, and prays for a decree determining the amount of complainant's distributive share and for general relief.

Defendant Frederick A. Van Dyke has answered, and complainant now moves to strike out each paragraph of the answer on grounds specified in the motion, and also to strike out the answer in its entirety because of the failure of defendant to answer any of the interrogatories of the bill.

Mr. John J. Crandall, for the complainant.

Mr. Eli H. Chandler, Messrs. Bedle, Edwards & Holmes, and Messrs. Thompson & Cole, for the defendants.

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LEAMING, V. C.

The real controversy between the parties arises by reason of the failure of defendant to answer the interrogatories of the bill. Defendant's answer avers, among other things, that his accounts have been settled in the orphans court and that complainant participated in that settlement. It is now urged on behalf of defendant that this statement of the answer exonerates him from specifically answering the interrogatories of the bill and from setting forth in his answer the accounts sought by complainant.

Motions against answers under rule 213 of this court have heretofore been confined to motions to strike out specific portions of the answer as insufficient, scandalous or impertinent, and have not been entertained to strike out an answer in its entirety. See *Wilson v. American Palace Car Co.*, 63 N. J. Eq. (18 Dick.) 557, and cases there collected. Such motions would also seem to be inadequate to reach an objection that defendant has made no attempt to answer specific interrogatories in a bill. Exceptions to the answer would, I think, more appropriately reach such objections. *Fuller v. Knapp*, 24 Fed. Rep. 100. But inasmuch as the manifest purpose of the pending motions is to compel defendants to answer touching the matters inquired of in the interrogatories forming part of the bill, and the defendant claims that the adjudication of the orphans court, set forth in the answer, operates as a bar to the right of complainant to compel specific answers, I shall, under the right inherent in this court to control its pleadings, treat the motions as raising the question really in controversy between the parties.

The jurisdiction of this court over the accounts of executors and administrators, and to enforce the claims of creditors, legatees and next of kin, is well settled and has been frequently exercised. A bill may be filed for the recovery of a legacy or distributive share either before or after a settlement in the orphans court. An action at law to recover a distributive share of an estate is purely statutory and can be maintained only after a decree of distribution. This statutory remedy is a remedy given in addition to that existing in equity and in no way limits or qualifies the jurisdiction of this court over the subject. *Frey*

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v. *Demarest*, 16 N. J. Eq. (1 C. E. Gr.) 236. The specific prayer of the bill in the present case is for an ascertainment of complainant's distributive share. The fact that the bill contains no specific prayer that the amount, when ascertained, be decreed to be paid to complainant, suggests no infirmity in the bill. The sureties of the administrators are made defendants, and a decree ascertaining the distributive share of complainant will fix the extent of their liability and afford the basis of an action on their bond, and the prayer for general relief will justify a decree for the payment of the distributive share.

This court has held that when jurisdiction has been assumed by an orphans court in the settlement of an estate, it is not the right of a next of kin to change the forum of settlement at his pleasure. The chancellor must exercise his discretion and judge as to the propriety of the court of chancery's interposing, and if any progress has been made in the orphans court in the settlement of the accounts, the court of chancery should not interfere with that tribunal unless there is shown some good cause for doing so, and fraud and mistake in the procurement of a settlement have been held to be the only grounds upon which this court will ordinarily look behind the settlement of an account in the orphans court, and that defects and errors in the account should be remedied in that court. *Salter v. Williamson*, 2 N. J. Eq. (1 Gr. Ch.) 480; *Van Mater v. Sickler*, 9 N. J. Eq. (1 Stock.) 483, 485; *Clarke v. Johnston*, 10 N. J. Eq. (2 Stock.) 287; *Voorhees v. Voorhees' Executor*, 18 N. J. Eq. (3 C. E. Gr.) 223, 227; *Search's Administrator v. Search's Administrators*, 27 N. J. Eq. (12 C. E. Gr.) 137, 139; *Titus v. Hoagland*, 39 N. J. Eq. (12 Stew.) 294, 298; *Matthews v. Hoagland*, 48 N. J. Eq. (3 Dick.) 455, 491; *Weyman v. Thompson*, 50 N. J. Eq. (5 Dick.) 8, 22; *Bird v. Hawkins*, 58 N. J. Eq. (13 Dick.) 229; *First National Bank v. Thompson*, 61 N. J. Eq. (16 Dick.) 188, 205; *Frey v. Demarest*, *supra*. But these equitable principles which guide the exercise of this jurisdiction in no way militate against the property of a next of kin seeking, in this court, an ascertainment of a distributive share, in a proper case, where a decree of distribution has not been made by the orphans court, or in seeking a discovery by defendants touching

the existence, character and disposition of certain assets—a beneficial form of relief peculiar to this court and extending to advantageous results not attainable by the orphans court procedure—or in seeking the procurement of a decree for the payment of a distributive share, or in seeking to remove to this court the final settlement of the accounts where fraud and mistake are alleged in the procurement of an adjudication already had in the orphans court. All these remedies are appropriately administered in equity upon the bill of a next of kin showing a reasonable necessity for the interposition of this court for the accomplishment of any of the purposes named.

The bill in this case alleges fraud in the accounts filed in the orphans court. The allegations of fraud are not as specific as is desirable, but as the accounts are peculiarly within the knowledge of defendant an over-rigorous enforcement of the rule requiring charges of fraud to be specific should be guarded against. The bill also seeks, by a series of specific interrogatories, to ascertain information touching certain securities which have come to the hands of defendant in this and in another jurisdiction. These interrogatories cover fields of information peculiarly within the knowledge of defendant and are operative in the domain of equitable procedure to discover important information which could not be reached through any recognized procedure of the orphans court. Answers to these interrogatories and a complete statement of assets received and moneys expended would go far toward aiding this court in determining whether the orphans court settlements shall be here reviewed. In view of these elements of the bill it is entirely clear that the averments of the answer touching the orphans court settlement, and complainant's participation in it, should not excuse defendant from answering all the material averments and interrogatories of complainant.

It would be inappropriate to at this time determine whether this court will review the proceedings already had in the orphans court. As already stated, the information sought by this bill is peculiarly essential to aid this court in that determination. An order will be advised directing defendant to answer fully all the interrogatories of the bill.

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It should not be necessary to state that answers to allegations of a bill should not be evasive, should not be in form, constituting them negative pregnant, and should not, as a rule, be framed to follow the language of the bill. Some of the motions against specific paragraphs of the answer are upon these grounds and are not without merit. *1 Dan. Ch. Pl. & Pr. *725, 726.* I have limited my considerations to the broader aspect of the controversy, and the views here expressed are deemed sufficient to direct the further progress of the cause. No costs are awarded.

MILLVILLE GAS LIGHT COMPANY

v.

VINELAND LIGHT AND POWER COMPANY.

[Decided December 21st, 1906.]

1. Legislative grants of franchises, whether granted by special charters or under general laws, confer privileges which are exclusive in their nature as against all persons upon whom similar rights have not been conferred. Any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred.

2. A court of equity will enjoin the unlawful invasion of a statute franchise.

3. The restraining power of a court of equity is exercised for the protection of rights, the existence of which are clearly established, and so far only as may be essential for the protection of those rights.

4. Public grants are construed strictly, and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public. The corporation takes nothing that is not clearly given by the act.

5. The word "town," as used in legislative acts in New Jersey, has no fixed significance, and its use must be applied according to the manifest legislative intention as gathered from the occasion and necessity of the act.

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6. Injunction denied because of want of sufficient certainty as to complainant's rights.

On order to show cause why a preliminary injunction should not issue.

Mr. Edwin F. Miller and Messrs. Gaskill & Gaskill, for the complainant.

Mr. Leverett Newcomb and Messrs. French & Richards, for the defendant.

LEAMING, V. C.

The bill in this cause is filed by the Millville Gas Light Company to procure an injunction to restrain the Vineland Light and Power Company from laying gas pipes in certain highways in the township of Landis, Cumberland county. The cause has been submitted, at the return of an order to show cause for a preliminary injunction, upon the bill and its accompanying affidavits on the part of complainant, and upon answering affidavits on the part of defendant. Complainant is a corporation engaged in the business of manufacturing and supplying gas. Its works are located in the city of Millville, and its corporate rights are derived from an act of the legislature of New Jersey, entitled "An act to incorporate the Millville Gas Light Company," approved March 20th, 1857. Defendant is a corporation engaged in a like business, with its gas works located in the borough of Vineland. The city of Millville is about six miles distant from the borough of Vineland. The territory between these two municipalities is the territory now in dispute, and is known as the township of Landis. In 1857, the date of the passage of the act incorporating complainant company, Millville township included all the territory now comprising the present city of Millville, the borough of Vineland and the township of Landis. Millville was then an unincorporated village. The township of Landis was set off from Millville township in the year 1864. The borough of Vineland was incorporated in the year 1880, and comprises one square mile of territory in the centre of the township

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of Landis. The city of Millville now comprises all of the territory of the old township of Millville which is not included within the boundaries of the township of Landis and the borough of Vineland.

In November last complainant determined to extend its gas mains from the city of Millville through the township of Landis to or toward the borough of Vineland. It is averred by complainant that as soon as active preparations were made for this work defendant hastily began laying its mains through the township of Landis from the borough of Vineland toward Millville, and along the highways which complainant was to occupy, with a view to interfere with complainant's work and to appropriate the territory secured to complainant by its legislative franchise. It is this work of defendant which complainant now seeks to enjoin.

It is claimed on behalf of complainant that the act of March 20th, 1857 (*P. L. 1857 ch. 164*), under which complainant is incorporated, granted to complainant a legislative franchise to lay gas pipes and mains in the highways throughout the territory then constituting Millville township, which territory, as stated, includes the present township of Landis and borough of Vineland. It is also claimed on behalf of complainant that defendant company is without right, either by legislative or municipal authorization, to conduct business as a gas company or to occupy any streets or highways for that purpose.

Legislative grants of franchises of the nature claimed by complainant, whether granted by special charters or under general laws, confer privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred, for any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred. *Raritan and Delaware Bay Railway Co. v. Delaware and Raritan Canal Co.*, 18 N. J. Eq. (3 C. E. Gr.) 546, 569; *Pennsylvania Railroad Co. v. National Railway Co.*, 23 N. J. Eq. (8 C. E. Gr.) 441, 447; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. (2 Stew.) 242, 250; *Elizabethtown Gas Co. v. Green*, 46

N. J. Eq. (1 Dick.) 118, 124; Pom. Rem. § 584. It follows that if complainant is at this time entitled to exercise in the disputed territory the privileges set forth in the legislative act referred to, and defendant, as claimed, enjoys no legislative sanction for the conduct sought to be enjoined, complainant will be entitled to the relief prayed for.

Defendant, however, denies the title of complainant to any franchise in the township of Landis and asserts, on its own behalf, a similar legislative grant covering that disputed territory.

At the hearing I expressed some doubt as to whether this court should entertain jurisdiction for preliminary relief, in view of the fact that complainant is not in the actual enjoyment of the disputed territory and the issues presented include a denial of the title of complainant to the right sought to be protected. While the violation of franchises afford frequent instances for the exercise of equity jurisdiction, I am not clear that any entirely satisfactory ground can be found to justify a court of equity in granting injunctive relief in favor of a complainant for the protection of a franchise the title to which is challenged by defendant in a case where complainant is not in the actual enjoyment of the franchise claimed. In *Whitchurch v. Hide, 2 Atk. 391*, the chancellor refused to entertain a bill for the protection of a franchise until complainant should have first established his title at law. In *Moor v. Veazie, 31 Me. 360, 377*, the view is entertained that a legislative grant of a franchise, emanating, as it does, from the people in their sovereign capacity, will be regarded as the equivalent of a right established at law, but the franchise there in question was in the actual enjoyment of complainant. In *Delaware and Raritan Canal Co. v. Raritan and Delaware Bay Railway Co., 16 N. J. Eq. (1 C. E. Gr.) 321, 378*, the chancellor says: "An injunction is the proper remedy to secure to a party the enjoyment of a statute privilege of which he is in the actual possession and when his legal title is not put in doubt." Where the basis of a bill is the refusal of defendant to yield to complainant the enjoyment of his legal estate in lands, and the title of complainant is in dispute, it is well settled that equity will not entertain

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jurisdiction until the title is first established at law. *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416; *Outcalt v. George W. Helme Co.*, 42 N. J. Eq. (15 Stew.) 665; *Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507. The prevailing view, however, appears to be that in the protection of certain intangible property rights, such as arise in actions to enjoin private nuisances, waste, the infringement of patents, of copyrights, of trade marks or literary property in manuscript writings, the law affords so inadequate a remedy that equity should extend its preventive writ for protection, even in cases where defendant brings into question the title of complainant to the rights asserted, and the wrongful invasion of a statute franchise is thought to invoke equitable jurisdiction as most nearly embodying the elements of a nuisance.

The primary inquiry, therefore, will be as to the character and extent of complainant's rights. In this inquiry certain well-settled rules must be recognized. The restraining power of a court of equity is only exercised for the protection of rights, the existence of which are clearly established, and so far only as may be essential for the protection of those rights, and it is also a rule of construction that public grants are to be construed strictly, and in all cases of grants of franchises by the public to a private corporation the established rule of construction is that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public. The corporation takes nothing that is not clearly given by the act. *Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Co. v. Raritan and Delaware Bay Railway Co.*, 16 N. J. Eq. (1 C. E. Gr.) 321; *Pennsylvania Railroad Co. v. National Railway Co.*, 23 N. J. Eq. (8 C. E. Gr.) 441, 455.

The legislative act, under which complainant claims (*P. L. 1857 ch. 164*), is as follows:

"An act to incorporate the Millville Gas Light Company.

"1. Be it enacted by the senate and general assembly of the state of New Jersey, that Ferdinand F. Sharp, John McNeal, Edward Tatem, James Loper, Nathaniel Stratton, Lewis Mulford, Furman L. Mulford and Elijah B. Richman, and all and every person or persons who may become subscribers according to the mode hereinafter prescribed, and their successors, are hereby created a body politic and corporate in fact, by the

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name of 'The Millville Gas Light Company,' and by the said name the said corporation shall have power and authority to manufacture, make and sell gas for the purpose of lighting the streets, buildings, manufactories and other places situated in the town of Millville and its vicinity.

"2. And be it enacted, that the said corporation shall be empowered to lay down their gas pipes, and to erect gas posts, burners and reflectors in the streets, alleys, lanes, avenues and public grounds of the town of Millville and its vicinity, and to do all things necessary to light the said town and the dwellings, stores and other places situated therein; provided, that the public travel shall at no time be affected or impeded by the laying of the said pipes or the erection of the said posts; and the streets, side and cross walks, public grounds, lanes and avenues shall not be injured, but shall be left in as good and perfect condition as before the laying of the said pipes or the erection of the said posts."

The other provisions of the act are not material to the present controversy.

The claim of complainant is that the words, "the town of Millville and its vicinity," as used in the first and second sections of the act, include the territory which comprised the township of Millville as it existed at the date of the passage of the act, whereas the contention on the part of defendant is that the words relate to only the territory which comprised the village of Millville, as it then existed, and the territory in its immediate vicinity, now defined by the corporate limits of the city of Millville. As already stated, Millville in the year 1857 was a small unincorporated village, and the township of Millville then embraced not only the village of Millville but also the territory now included in the present city of Millville, township of Landis and the borough of Vineland, respectively.

The significance of the word "town," as used in legislative acts, has been the subject of judicial examination in this state in a number of cases. These cases are all collected in *Brown v. Town of Union*, 62 N. J. Law (33 Vr.) 142, except the case of *Holmes v. Jersey City*, 12 N. J. Eq. (1 Beas.) 299, which is not there cited. These cases fully determine that the word has no fixed significance in New Jersey. The word, as used in the constitution and in various statutes, is held to be of such uncertain meaning, standing alone, that the courts have uniformly applied its use according to the manifest intention of the legislation as gathered from the occasion and necessity of the act. By the

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adoption of this rule of construction in this case the legislative grant to complainant was either for the village of Millville and its vicinity or the township of Millville and its vicinity, according as the legislative intent may be more clearly manifest. To conclude that the latter was intended would seem to conflict with the reasoning adopted by the court of errors and appeals in *Madison v. Morristown Gas Light Co.*, 65 N. J. Eq. (20 Dick.) 356, where it was held to do violence to the word "vicinity" to assume that the legislature intended by that word, similarly used, to include territory of an independent municipality not named. The more apparent legislative intent in the use of the expression, "the town of Millville and its vicinity," in the act in question, appears clearly to be the equivalent of the expression, the village of Millville and its vicinity, and that is the meaning which I attribute to the language used. The determination of what territory was intended by the use of the word "vicinity" is more difficult. I am impressed that an accurate determination of the legislative intent in the use of that word in the act in question is dependent largely on an intimate knowledge of the physical conditions which existed at that time at the village of Millville and the territory surrounding it. How large a village, territorially, was Millville in 1857? Were there other villages in Millville township, near by or distant, which might then have been reasonably thought to be appropriate territory to receive a supply of gas, either presently or in the near future? Was the entire township, other than Millville, a sparsely settled country district, or were there other municipalities in the township at that time? These and other physical conditions, not disclosed by the record, would seem to be almost essential to an intelligent determination of the import of the word "vicinity" as used in the act. But without something to indicate a legislative intent to include more territory than would naturally be imported by the expression "Millville and vicinity," I am unable to conclude that the language used was intended to include the entire township. It will be noted that the second section of the act empowers complainant "to lay down their (its) gas pipes and to erect gas posts, burners and reflectors in the *streets, alleys, lanes, avenues and public grounds* of the town of Millville and

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its vicinity." The absence of a reference to roads, as well as the natural significance of the expression, carries with it a suggestion of some force that an entire township was not within the contemplation of the legislative body. My conclusion is that it does not at this time appear with sufficient certainty that complainant is the owner of a franchise covering the territory in dispute to justify this court in granting a preliminary injunction against defendant.

In refusing an injunction I do not wish to be misunderstood. The injunction is refused because at this time I deem the rights of complainant, as disclosed by the record, to be too uncertain to justify preliminary relief. This must not be deemed to pre-judge the case of complainant on final hearing, for, as already indicated, the significance of the word "vicinity" may well be controlled by facts not at this time within the knowledge of the court. Should defendant continue the construction of its works within the territory in dispute, it will do so at its own risk. The bill may stand as one for mandatory relief at final hearing.

The conclusion I have reached renders unnecessary a discussion of the other questions presented. The order to show cause will be dismissed.

LUCY DAY HOLTON

v.

CORA J. HOLTON.

[Decided December 22d, 1906.]

1. A motion against an entire bill, under chancery rule 213, may be treated as essentially a demurrer to the bill.

2. To enable this court to decree a resulting trust to grantor, where an absolute deed of conveyance reciting a pecuniary consideration is executed and delivered, the intention that the grantee is not to enjoy the beneficial estate, but that a trust is to result, must appear expressly or by implication from the terms of the deed, and no extrinsic evidence of grantor's intention is admissible unless fraud or mistake is averred.

2 Buch.Holton v. Holton.

3. The fact that a conveyance was from a father to his daughter and that the father retained possession of the property conveyed and received its revenues and made improvements, standing alone, and without any averment of fraud or mistake through undue influence, or want of appreciation upon the part of the grantor as to what he was doing, or that the grantor was without ample means to warrant a gift, or was without the benefit of disinterested and competent advice, or entertained a purpose contrary to that expressed in the deed, is not sufficient to raise the presumption of a constructive trust and to cast upon the grantee the burden of answering.

On motion to strike out bill of complaint.

The bill is filed by complainant as widow and devisee of Theodore Holton, deceased, to establish a trust touching certain land conveyed to defendant by testator in his lifetime. Defendant is the daughter of testator. Defendant now moves to strike out certain portions of the bill and also to strike out the bill in its entirety.

The facts disclosed by the bill are, briefly, that testator, in the year 1901, conveyed two certain lots of land to defendant. The consideration expressed in the deed is "one dollar and love and affection for his daughter." At the time of the conveyance there was a dwelling-house on one of the lots, and on the other testator was then beginning the erection of a dwelling-house. Complainant was married to testator about two months after the execution of the deed. Defendant has never been in possession of the properties conveyed or exercised any act of ownership over them. One house was occupied by testator and complainant from the time of their marriage until the death of testator in August, 1906, and is still occupied by complainant; the other house has always been rented by testator. One of the houses was erected by testator at his own expense after the execution of the deed in question. All repairs and taxes have been at testator's expense. Complainant is seventy-six years old. Testator left no property other than the two lots in question. Testator told complainant that he had placed the title to the lots in the name of his daughter, to hold the same for his benefit. The time when this statement was made is not made clear by the bill.

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On October 10th, 1905, testator signed the following paper writing:

"October 10, 1805.

"VINELAND, NEW JERSEY.

"Now in regard to this place that we now live in I wish my wife to have it for she has done more for me than all of my children and no expense to me, and I want her to have her to have enough out of the other house to pay her for taking care of me since I have been sick, she has been a good wife to me. Now this is all I can think of now at this time.

"THEODORE HOLTON.

"My children are good, but you cannot expect that children can do as a wife can.

"Witness

"JAMES CHANCE

"Oct. 10/05."

By the will of testator, dated August 3d, 1906, one of the lots is devised to complainant, and the other lot is devised to defendant, subject to a one thousand dollar charge in favor of complainant.

The bill contains no averment of fraud or mistake in the execution of the deed. The age of testator is not given. No information is given as to the condition of body or mind of testator at the date of the conveyance or as to what property he may have owned at that time, or as to the relations which at that time existed between testator and his daughter, and no allegation is made that testator made the conveyance in question by reason of undue influence, or without disinterested or competent advice, or with any purpose other than that disclosed by the deed of conveyance.

Mr. Herbert C. Bartlett, for the complainant.

Mr. J. Fithian Tatem, for the defendant.

LEAMING, V. C.

The motion against the entire bill will alone be considered, as it is manifest that no relief can be granted under this bill. Under rule 213 this motion will be treated as essentially a demurrer to the bill. *Ireland v. Kelly*, 60 N. J. Eq. (15 Dick.)

2 Buch.

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308, 310; *Stevenson v. Morgan*, 63 N. J. Eq. (18 Dick.) 707; *Hanneman v. Richter*, 63 N. J. Eq. (18 Dick.) 753, 755.

The allegations of the bill are clearly insufficient to establish a resulting trust. When a deed of conveyance is executed and delivered, the intention that the grantee is not to enjoy the beneficial estate, but that a trust is to result must appear expressly or by implication from the terms of the deed, and no extrinsic evidence of the grantor's intention is admissible unless fraud or mistake is averred. If the deed recites a pecuniary consideration, though only nominal, that recitation raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence will be admitted to show that there was, in fact, no consideration, unless fraud or mistake is shown. *Osborn v. Osborn*, 29 N. J. Eq. (2 Stew.) 385; *Stucky v. Stucky*, 30 N. J. Eq. (3 Stew.) 546, 554; *Coffey v. Sullivan*, 63 N. J. Eq. (18 Dick.) 290, 303; *Fretz v. Roth*, 68 N. J. Eq. (2 Robb.) 516, 527; 3 Pom. Eq. Jur. § 1036.

It is not so certain that the allegations of the bill may not support a constructive trust, but I entertain the view that the mere facts that the conveyance was from a father to a daughter, and that the father retained possession of the property conveyed and received its revenues and made improvements, standing alone, and without any averment of fraud or mistake through undue influence or want of appreciation upon the part of the grantor as to what he was doing, or that grantor was without ample means to warrant a gift, or was without the benefit of disinterested and competent advice, or entertained a purpose contrary to that expressed in the deed, are not sufficient to raise the presumption of a constructive trust and to cast upon the grantee the burden of answering. The authorities collected in *Fretz v. Roth*, 68 N. J. Eq. (2 Robb.) 516 (at p. 528), to which may be added *Slack v. Rees*, 66 N. J. Eq. (21 Dick.) 447, and *James v. Aller*, 68 N. J. Eq. (2 Robb.) 666, disclose fully the various conditions which may exist to establish the presumption of a constructive trust under a conveyance similar to the one in question. The averments of the bill are not, in my opinion, sufficient for that purpose.

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The motion to strike out the entire bill will be sustained. Should complainant desire to file an amended bill by the addition of averments sufficient to sustain a constructive trust, leave will be granted for that purpose.

LUTHER BATEMAN et al.

v.

WILLIAM W. RILEY.

[Decided December 21st, 1906.]

1. A bill for specific performance may be maintained by the assignee of the vendee in a contract for the sale of land.

2. In a contract for the sale of land a description of land is sufficiently definite to enable the vendee to maintain a bill for specific performance if the land is described in such a manner that it may be with certainty ascertained. Parol evidence is admissible to show that defendant owned only certain land which would answer the description contained in the contract of sale.

3. In a contract for the sale of land made by a husband, in which his wife has not joined, specific performance will not be decreed against the husband either with abatement from the purchase price or with a requirement that the husband give indemnity to the vendee against the inchoate right of dower of his wife, in a case where the wife refuses to sign the deed, unless such refusal is shown to have been induced by the husband.

On bill, answer, replication and proofs.

Mr. Walter H. Bacon, for the complainants.

Mr. Charles E. Sheppard and *Messrs. Carrow & Kraft*, for the defendant.

LEAMING, V. C.

The bill is filed by complainants as vendees to procure a decree of specific performance of a contract made by defendant for the conveyance of land.

2 Buch.Bateman v. Riley.

The written contract is as follows:

"Recd of Luther Batem one hundred \$ on payment of a thousand \$ for all the beach front and marsh land that I own at or near Fortescue Island and I agree to turn over all leases that I hold to him.

"Dated Jan. 13th, 1906.

"deed given on the 15th int.

WM. W. RILEY.

WM. W. RILEY."

It is urged on behalf of defendant that a decree of specific performance cannot be made in this cause because complainants Samuel Bradford and Lewis N. Bradford, Jr., are not parties to the written contract. This objection is without merit. At the hearing a written assignment was received in evidence whereby the vendee named in the contract assigned to his co-complainants each an undivided one-third interest therein. A bill for specific performance may be maintained by the assignee of the vendee in a contract for the sale of land. The only conflict of authorities upon the subject is as to whether it is necessary for the assignee of the original vendee to make the original vendee a party. But that question is not present in this case. *Pom. Spec. Perf.* § 487. At the hearing evidence was received showing that the contract was made in the interest of the three complainants. That evidence need not be considered.

It is further urged on behalf of defendant that the description of the land, as contained in the contract, is too uncertain to entitle this court to decree specific performance. There is no difficulty in ascertaining the land to which this contract refers. An examination of the records in the county clerk's office discloses the exact boundaries of the land referred to in the contract. At the hearing these records were produced and received in evidence. The statute of frauds requires no more than that the land shall be described with reasonable certainty. It is enough if the property is described so that it may be with certainty ascertained, and parol evidence is admissible to show that defendant owned only certain land which would answer the description of the contract. *Robeson v. Hornbaker*, 3 N. J. Eq. (2 Gr. Ch.) 60; *Camden and Amboy Railroad Co. v. Stewart*, 18 N. J. Eq. (3 C. E. Gr.) 489, 491; *Lewis v. Reichy*, 27 N. J.

Eq. (12 C. E. Gr.) 240; Tillotson v. Gesner, 33 N. J. Eq. (6 Stew.) 313, 319; Champion v. Genin, 51 N. J. Eq. (6 Dick.) 38, 39; Price v. McKay, 53 N. J. Eq. (8 Dick.) 538; Riley v. Hodgkins, 57 N. J. Eq. (12 Dick.) 273; Brooks v. Wentz, 61 N. J. Eq. (16 Dick.) 474.

A third objection urged on behalf of defendant is fatal to complainants' right to the relief sought. It has been the uniform practice of this court to refuse to decree the specific performance by a husband of a contract for the sale of land, with either abatement from the price or with indemnity, where a wife has not joined in the contract of sale, and refuses, of her own volition, to join in a deed. *Young v. Paul, 10 N. J. Eq. (2 Stock.) 401, 418; Hawrally v. Warren, 18 N. J. Eq. (3 C. E. Gr.) 124, 128; Pinner v. Sharp, 23 N. J. Eq. (8 C. E. Gr.) 274, 282; Reilly v. Smith, 25 N. J. Eq. (10 C. E. Gr.) 159, 159; Peeler v. Lery, 26 N. J. Eq. (11 C. E. Gr.) 330, 335; Blake v. Flatley, 44 N. J. Eq. (17 Stew.) 228, 229; McCormick v. Stephany, 61 N. J. Eq. (16 Dick.) 208, 224.*

An effort was made upon the part of complainant to show that defendant induced his wife to refuse to sign a deed in fulfillment of the contract in question. A finding to that effect could not be justified on the evidence adduced.

I am obliged to refuse a decree for specific performance against the husband, with either an abatement from the purchase price or indemnity against the inchoate dower of defendant's wife. Complainants may take a decree for conveyance from the husband, without abatement or indemnity, or the bill will be dismissed. In either event defendant will be entitled to costs, as defendant tendered a deed from himself to complainants for the land in question before the bill was filed.

2 Buch.Porch v. Agnew Co.

WESLEY B. PORCH

v.

AGNEW COMPANY.

[Decided January 5th, 1907.]

A person who files a claim with a receiver of an insolvent corporation and sustains his claim before the receiver and before this court on appeal, is not a complainant within the meaning of the ninety-first section of the Chancery act (*P. L. 1902 p. 540*), and is not entitled to the allowance of a counsel fee to be included as taxable costs.

On motion for allowance of counsel fee to be included in taxed costs.

Duparquet, Huot & Moneuse Company filed with the receiver of defendant, an insolvent corporation, a verified claim in which the claimant asserted a mechanics' lien against certain real estate of the insolvent company. Clarence M. Busch, a mortgagee of the same real estate, unsuccessfully contested the claim before the receiver. From the receiver's decision Busch appealed to this court under the provisions of section 78 of the Corporation act of 1896 (*P. L. 1896 p. 302*), and the decision of the receiver was here affirmed. Busch then appealed to the court of errors and appeals and the decision of this court was there affirmed. Application is now made under section 91 of the Chancery act of 1902 (*P. L. 1902 p. 540*) for an allowance of a counsel fee for Duparquet, Huot & Moneuse Company to be included in the taxable costs.

Mr. William M. Clevenger, for the motion.

Messrs. Thompson & Cole, contra.

LEAMING, V. C.

Section 91 of the Chancery act (*P. L. 1902 p. 540*) allows a counsel fee to be fixed by the chancellor and included in a complainant's taxable costs. In *McMullin v. Doughty*, 68 N. J. Eq. (2 Robb.) 776, the court of errors and appeals sanctioned the allowance, under this section, of a counsel fee to complainant in a partition cause prosecuted in this court. The allowance of a counsel fee to the present applicant should manifestly be made if authority can be found to support it; but the statute, in terms, applies only to complainants, and I am unable to discern any legislative purpose to extend the provisions of the section in question beyond the primary and natural significance of the language used. One who files a claim with a receiver, and who is afterwards obliged to support his claim before this court on appeal, occupies a position similar to a complainant in a bill in equity to the extent that he has the affirmative of an issue to sustain; but such similarity is not based upon any principles peculiar to equitable remedies. His claim may be, and usually is, a strictly legal claim, with no inherent element to confer equitable jurisdiction. The claim now in question was such a claim. The procedure is purely statutory and is, by the statute, described as "summary." It is clear that the present applicant can only be brought within the provisions of the section by treating the section as an enactment intended to apply to all successful litigants in a court of equity except defendants. I am unable to find any justification for so broad an interpretation of the section. The motion must be denied.

§ Buch.**Buvinger v. Evening Union Printing Co.**

RALPH R. BUVINGER**v.****EVENING UNION PRINTING COMPANY.**

[Decided January 5th, 1907.]

1. A chattel mortgage may be made a lien on the outstanding book accounts due to a mortgagor, and also upon such book accounts as shall thereafter become due to the mortgagor in the regular course of his business.

2. The general manager of a corporation, who was also a stockholder and a member of the board of directors, held to be entitled to preferment under *P. L. 1896 p. 303 § 83* for two months' wages next preceding the institution of proceedings of insolvency.

On appeal from the decision of a receiver touching the allowance of claims.

Mr. William M. Clevenger, for the appellant.

Messrs. Bourgeois & Sooy, for the receiver.

LEAMING, V. C.

The first question presented is whether a certain chattel mortgage, executed by defendant corporation prior to its insolvency, is a lien on outstanding book accounts due to the corporation at the time it became insolvent and passed into the hands of a receiver.

The chattel mortgage in question was executed to the Guarantee Trust Company, February 1st, 1902, to secure an issue of coupon bonds made by mortgagor. It embodies the ordinary features of trust mortgages, and is executed in conformity to the requirements of the statutes touching chattel mortgages.

The resolution of the stockholders authorizing the mortgage

is recited in the instrument and refers to the chattels to be covered by the mortgage in the following language:

"That the president and secretary be and they are hereby authorized and directed to make and execute, under the corporate seal of said company, an indenture of mortgage covering all of the presses, type-setting machines, type, rules, slugs, folders, cutters, stock and all other goods and chattels and personal property of any kind or character now or which shall hereafter be owned by the said Evening Union Printing Company, together with the 'Daily Union,' 'Atlantic Times-Democrat' and 'Star Gazette,' or any other newspapers now or hereafter to be published by the said company, all of which property now owned by said company and all of which papers now published by said company are located at 1632 Atlantic avenue, in the city of Atlantic City, in the county of Atlantic and State of New Jersey, together also with the privileges, franchises and appurtenances of and belonging to this company wheresoever situate, or that may be hereafter acquired by or conferred upon this company, including the franchise to be a corporation."

The resolution further provides:

"That for the better securing of the money due to the purchasers of the bonds secured by said mortgage, a sinking fund be created for the purchase and cancellation of the bonds to be issued by this company, and to that end the income from the business to be conducted by this company, after first paying the floating indebtedness amounting to \$4,970.99, assumed by this company upon the purchase of the said property from the Daily Union Printing Company, and after paying all salaries and other expenses of any kind or character, and before paying any dividend to the holders of shares of capital stock of this company, the balance in the hands of the treasurer at the end of each fiscal year shall be credited to the sinking fund account for the purposes aforesaid."

The resolution of the board of directors, passed to carry into effect the resolution of the stockholders, is also embodied in the mortgage, and in describing the property to be covered by the mortgage follows the exact language of the stockholders' resolution.

In the granting clause of the mortgage the description of the property mortgaged specified the two newspapers referred to and their good will and the job printing business conducted in conjunction with them, and then enters upon an enumeration of various printing presses, each press being specifically described, and also a type-setting machine and certain shafting and belting

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and a certain electric motor, and then proceeds with the following language:

"Together with all of the type, slugs, rules, racks, frames, quods, furniture, desks, chairs, cabinets, leads, galleys, stones, saws and all personal property of any kind or character now belonging to the said Evening Union Printing Company, or which may hereafter belong to the said Evening Union Printing Company, either by way of renewal of the goods and chattels above described, or by way of additions thereto, including the right and franchise to be a corporation, and also all of the estate, rights, titles, incomes and interest whatsoever, as well at law as in equity of the said party of the first part in and to the same."

"To have and to hold the said newspapers, goods and chattels and other personal property, as well as the corporate rights, privileges and franchises unto the said party of the second part, its successor or successors in trust," &c.

Among the stipulations contained in the mortgage is one making provision for the sinking fund as referred to in the resolutions above quoted. By this stipulation a sinking fund is created for the purchase and cancellation of the bonds after first paying the floating indebtedness referred to, "and after paying all salaries and other expenses of any kind or character."

I am of the opinion that this chattel mortgage is a lien on the outstanding book accounts due to defendant corporation at the date of its insolvency. This court has repeatedly held that a mortgagor of chattels may be permitted to transact business and make sale of the mortgaged chattels in the regular course of his business, and that in such cases the lien of the mortgage, if so stipulated, will attach to the chattels from time to time acquired to supply the place of the chattels sold. With these rights of a mortgagor and mortgagee recognized, no reason is apparent why outstanding choses in action may not, in like manner, be included in the lien of the mortgage and the privilege be extended to the mortgagor to collect and apply such choses in action under a stipulation that the lien of the mortgage shall include new accounts arising in the regular course of the business. In *Nugent v. McNeil Shoe Co.*, 62 N. J. Eq. (17 Dick.) 583, 585, the right to include outstanding book accounts in the lien of a mortgage is recognized. In any ordinary commercial business credit transactions are a well-recognized necessity, and the privilege of

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a mortgagor to sell and replace mortgaged goods does not essentially differ in effect from the privilege of collecting and replacing choses in action. I see no reason why the lien of a chattel mortgage should not, by appropriate provisions contained in the mortgage, be preserved as to book accounts arising after the date of the mortgage.

Does the language of the mortgage in question include outstanding book accounts then existing and thereafter to be created? The authority given by the stockholders and directors to the executive officers was to execute a mortgage covering specific chattels named, and then adding:

"And all other goods and chattels and personal property of any kind or character now or which shall hereafter be owned by the said Evening Union Printing Company."

Pursuant to that authority the mortgage was executed on certain enumerated chattels with the following language added:

"And all personal property of any kind or character now belonging to the said Evening Union Printing Company, or which may hereafter belong to the said Evening Union Printing Company, either by way of renewal of the goods and chattels above described, or by way of additions thereto, including the right and franchise to be a corporation, and also all of the estate, rights, titles, incomes and interest whatsoever, as well at law as in equity of the said party of the first part in and to the same."

The mortgage also made provision for mortgagor to continue its business in the regular course. The intention of the parties to include in the lien of this mortgage all of the assets of the mortgagor then existing and thereafter to be acquired in the progress of its business, is, to my mind, clearly manifest from the terms of the mortgage. Where the language used so clearly manifests a purpose to include all assets of mortgagor of every character, present and prospective, an over technical measurement of the specific words used should not be indulged in to defeat the general and manifest intention. No creditor of mortgagor could have been reasonably misled by the language used. I think it clear that the outstanding choses in action of mortgagor are covered by the lien of this mortgage. I do not find in the sink-

2 Buck.

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ing fund clause any element to modify this view. That clause does no more than adopt a plan for the operation of the business of mortgagor during the period preceding default. It cannot be treated as a stipulation for the application of the assets of mortgagor after default or after insolvency.

The other question presented by the appeal is whether a general manager of a corporation, who was also a stockholder and a member of the board of directors, is entitled to a "labor claim" for the two months' services rendered by him immediately prior to the appointment of a receiver.

The present claim is made under section 83 of the Corporation act. *P. L. 1896 p. 303*. The case of *England's Executors v. Beatty Organ Co.*, 41 N. J. Eq. (14 Stew.) 470, was decided under the provision of the statute of 1869. *P. L. 1869 p. 1448; Rev. p. 188*. It was there held that the president of a corporation was not a laborer within the meaning of the old act. Section 83 of the present Corporation act is practically the same as section 1 of the act of April 8th, 1892. *P. L. 1892 p. 426*. Under the latter act it was held, in *Consolidated Coal Co. v. Keystone Chemical Co.*, 54 N. J. Eq. (9 Dick.) 309, that the bookkeeper of a corporation, though a director, was entitled to the preference given by the act. It is there noted that the later act is broader in its scope than the former one; and the view is also taken that while the duties of a president of a corporation may well be confined to matters supervisory in their nature, those of a bookkeeper involve labor in the strict sense of the word. In *Campbell v. Taylor Manufacturing Co.*, 64 N. J. Eq. (19 Dick.) 622, it is suggested that the preference given by this statute to employees of a corporation was probably created for the purpose of preventing a general exodus of the workmen employed by the corporation in anticipation of the failure of the company. I am impressed that in this suggestion is to be found the true purpose and underlying spirit of the act. While the duties of the present claimant may not have involved the degree of manual labor which ordinarily falls to a bookkeeper, yet I think it clear that he is included in the spirit and purpose of the legislation. The language of the statute is: "All persons doing labor or service of whatever character, in the regular employ of such corporation."

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72 Eq.

If the recognized purpose of the statute be the preservation of the organized operative force of a corporation in a time of embarrassment, this language clearly must be held to include the general manager, even though he be a director and therefore a member of the board which employed him. His retention as the immediate supervisor and organizer of the operative force of employees is peculiarly essential to the accomplishment of the purposes of the act. Let his claim be allowed.

By the eighty-fourth section of the Corporation act these labor claims are postponed to the lien of a chattel mortgage which has been recorded more than two months next preceding the date when proceedings in insolvency shall have been actually instituted against the insolvent corporation.

JOSEPH E. ROBERTS, JR.,

v.

WEST JERSEY AND SEASHORE RAILROAD COMPANY.

[Decided January 12th, 1907.]

1. Equity has no jurisdiction of a suit by an owner of property in a block through which an elevated railroad was about to be constructed, crossing and vacating a street on which complainant's property abutted, to enjoin its construction, unless complainant, by the undisputed facts of the case, and according to the settled law of the state, establishes his legal private right in that part of the street which would be vacated by the construction of the road.

2. In a suit to enjoin the construction of an elevated railway, and the vacation of a certain street therefor, the fact that the legal right on which complainant founded his claim was wholly settled was not shown, where it did not appear that his predecessor in title purchased by reference to the street, the vacation of which was sought to be enjoined, at any time prior to its becoming a public street, though it was alleged that complainant's predecessor in title and the other owners on that street widened it, by vacating ten feet of their respective fronts, thus making the several properties more valuable, and increasing the price the complainant was obliged to pay for his property.

2 Buch. **Roberts v. West Jersey and Seashore Railroad Co.**

3. Nothing short of threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must result in irreparable damages, will justify the granting of an injunction staying an important public work, such as the construction of an elevated railroad and the vacation of a street therefor.

On bill for injunction and answering affidavits.

The bill seeks to enjoin defendant from constructing its elevated railway across Cherry street, Camden. The proposed structure will be an embankment which wholly prevents travel along the old line of the street. Complainant is the owner of property in the block where the crossing is being constructed. The present application is for a preliminary injunction, and has been heard on bill and answering affidavits at the return of the order to show cause.

Mr. E. Ambler Armstrong, for the complainant.

Messrs. Gaskill & Gaskill, for the defendant.

LEAMING, V. C.

The elevated railway of defendant is being constructed pursuant to the provisions of the act of March 20th, 1901 (*P. L. 1901 p. 116*), which act authorizes a city to enter into a contract with a railroad company to change or elevate its road, and for that purpose to vacate, change the grade of, or alter the lines of streets. Pursuant to that statute contracts were made and ordinances passed by the city of Camden authorizing the work now in progress. Among the ordinances passed for the purpose was one vacating that portion of Cherry street now in question. Defendant is the owner of the property on either side of Cherry street abutting the part vacated.

The claim of complainant is based upon the theory that the vacation of the portion of Cherry street in question is, in legal effect, no more than a vacation of the public rights in the part of the street vacated, and that there still remains in the property owners on other parts of the street—and especially property owners in the same block—private rights in the part vacated

which cannot be destroyed by municipal action without compensation. The private rights referred to are those described in *Booraem v. North Hudson County Railroad Co.*, 40 N. J. Eq. (13 Stew.) 557, 564, as emanating as follows:

“Whenever a dedication of a public highway is effected—as it usually is—by means of a conveyance to private persons by reference to a proposed street over other lands of the grantor, the private rights of the several grantees precede the public right, and are the source from which the public right springs. By such conveyance the grantees are regarded as purchasers by implied covenant of the right to the use of the street as a means of passage to and from their premises, as appurtenant to the premises granted, and this private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public.”

If it were necessary in this case to determine whether private rights acquired in this manner survive after the street has been accepted by a municipality and thereafter vacated, I should favor the view that the implied covenants from which these rights emanate relate only to the period of time between the original act of dedication and its consummation arising from the acceptance by the municipality; that the implied covenants contemplate not only the probable future acceptance by the municipality, but also contemplate the surrender of entire dominion and control to the municipality for the public welfare when such dedication shall have been consummated by public acceptance. But this view is not essential to the proper disposition of the present application, for this court has no jurisdiction to award the relief sought unless the legal right on which complainant rests his claim is, as a matter of law, wholly settled. To entitle complainant to the writ he seeks he must have demonstrated that, on the undisputed facts of this case, and according to the established law of this state, he has the private right which he claims in that part of Cherry street which has been vacated. *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416; *Outcalt v. Helme*, 42 N. J. Eq. (15 Stew.) 665; *Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507.

2 Buch. Roberts v. West Jersey and Seashore Railroad Co.

The unsettled nature of complainant's claim is apparent. In *Booraem v. North Hudson County Railroad Co.*, *supra*, a claim of rights of this class is treated as doubtful. In *Dodge v. Pennsylvania Railroad Co.*, 43 N. J. Eq. (16 Stew.) 351, 354 (*affirmed*, 45 N. J. Eq. (18 Stew.) 366), it is said:

"The precise question, then, which this case presents is this. Is it settled, as a matter of law in this state, that if any part of a public street is, at any time subsequent to the date of a conveyance of land abutting on it, abandoned or surrendered, the grantee named in such conveyance takes, by implied grant or covenant, a private right of way over that part of the street in which the public right has been extinguished? I know of no case decided by a superior court in this state which so discloses the law. None was cited on the argument of the motion. The question is one on which the courts of sister states are at variance."

In the present case it does not clearly appear that complainant's predecessor in title purchased, by reference to Cherry street, at a time prior to that street becoming a public street; but the averment is made that complainant's predecessor in title and the other owners on that street widened the street by vacating ten feet of their respective fronts, thus making the several properties more valuable, and that by reason of that fact complainant was obliged to pay an increased price for his property. In *Kean v. Elizabeth*, 54 N. J. Law (25 Vr.) 462, the claim was made by prosecutrix that when the street on which she owned was laid out she was assessed for benefits, and on that fact she based a claim to a vested right in the continued existence of the street, and contested the vacation of a portion of the street distant from her property. The right there asserted somewhat resembles the claim here asserted, based on the widening of the street at complainant's expense. The view entertained by the supreme court was that the damages complained of by prosecutrix, though greater in degree, were not different in kind from that of any other member of the community who would have had occasion to pass over the vacated highway.

Another ground exists on which the relief prayed should be denied. In *Dodge v. Pennsylvania Railroad Co.*, *supra*, the

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learned vice-chancellor states with great force, as a principle of equity, that in cases like the present, where, if the court acts, an important public work, designed to free public travel from peril and to give greater security to human life, will be arrested and seriously delayed, nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which if not prevented must result in irreparable damage, will justify the court in issuing a command that the work should stop.

The motion for an injunction will be denied.

JOHN B. STEELMAN

v.

ANDREW BLACKMAN.

[Decided January 14th, 1907.]

The purpose of the statutory bill in equity to quiet title to lands, authorized by 3 Gen. Stat. p. 3486, is to afford a remedy to a person in peaceable possession of lands where no adequate remedy at law exists. The statutory bill will not be entertained where it appears that defendant entered upon the land in question and plowed it for purposes of cultivation only a few weeks before the bill was filed, and that before the bill was filed complainant knew that the plowing had been done and was informed by his neighbors that it had been done by defendant, and, by a reasonable effort, could have procured the necessary evidence of the act of defendant to have based an action at law against him.

On bill to quiet title.*Messrs. Bourgeois & Sooy*, for the complainant.*Mr. Harry R. Coulomb*, for the defendant.

2 Buch.Steelman v. Blackman.

LEAMING, V. C. (orally).

The bill is filed under our statute (*3 Gen. Stat. p. 3486*) to quiet title to a tract of land in Atlantic county. Defendant having asked for a feigned issue, pursuant to the statute, the present hearing has been confined to the preliminary inquiry as to whether complainant is entitled to pursue the statutory remedy.

To entitle complainant to pursue this remedy in this court it must appear that, at the time the bill was filed, he was in peaceable possession of the land in question. The purpose of this statute is to afford a remedy in this court where none exists at law, and the requirement of the statute that complainant must be in peaceable possession is but the equivalent of a statement that the remedy under the statute will be confined to that class of cases where the law courts fail to afford an adequate remedy.

The proofs disclose that about a week before this bill was filed defendant entered upon the land in question and for a half day plowed the land for the purpose of cultivation. After the bill was filed defendant finished the plowing and cultivated the land. The proofs also disclose that, at the time the bill was filed, complainant knew that the plowing had been done, and that he was informed by his neighbors that it had been done by defendant. I am entirely clear that under these conditions it was incumbent upon complainant to exercise at least a reasonable effort to procure the necessary evidence upon which to base an action at law before he could properly apply to this court for the statutory remedy under the claim of a peaceable possession. The trespass upon the land in question was of no ordinary character, and the certain ascertainment of who did the plowing was necessarily easy of accomplishment, and my judgment is that that duty rested upon complainant before he became entitled to avail himself of this statutory action. Had complainant made a reasonable effort to ascertain who did the plowing and failed to procure the necessary evidence to enable him to maintain an action at law, a different condition would now be presented; but in view of the well-recognized purpose of the statute to afford

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a remedy only where no remedy at law exists, I am of the opinion that complainant is not entitled to invoke the aid of the act.

I entertain some doubt as to the admissibility of the testimony touching the proceedings before the township committee and the notice given by the township clerk. I will, however, deny the motion to strike it out, and the complainant may have the benefit of my refusal to exclude it.

I will advise a decree dismissing the bill for want of jurisdiction of this court to entertain it.

ATLANTIC CITY RAILROAD COMPANY

v.

ALFRED JOHANSON et al.

[Decided January 16th, 1907.]

1. This court will enjoin the execution of a judgment at law, rendered in an action of ejectment, when it appears that the defendant in the legal action had an equitable estate in the *locus in quo* which was sufficient to afford him equitable protection against dispossession at the instance of the plaintiff and the existence of which equitable estate afforded no defence in the court of law.

2. Where the defendant in ejectment purchased the *locus in quo* by parol agreement from the predecessor in title of the plaintiff and paid the full consideration of the purchase and entered into possession by consent of the vendor, the statute of frauds is not a bar to the existence of an equitable estate in the purchaser. A subsequent purchase of the land from the record owner by the plaintiff in ejectment, at a time when the defendant in ejectment was in visible possession under his prior purchase, is with constructive notice of the equitable estate of the defendant and constitutes the subsequent purchaser a trustee of the legal estate for the benefit of the prior purchaser. As such trustee the subsequent purchaser can maintain an action of ejectment against his *cestui que trust*, and the latter can only defeat recovery in a court of equity.

3. The fact that the *locus in quo* was a highway, and that the possession of defendant consisted of the occupancy of the highway with a steam railway, does not militate against the application of the principles defined.

*2 Buch.**Atlantic City Railroad Co. v. Johanson.*

On order to show cause why a preliminary injunction should not issue. Heard on bill, answer and affidavits.

Alfred Johanson and wife, two of the present defendants, are in possession of and claim to own certain lots of land on the north side of Salem street, between Burlington street and Broadway, Gloucester, and claim to own the fee of Salem street, in front of the lots, to the centre line of that street, subject alone to the servitude occasioned by the public highway. Complainant is a railway corporation, and the line of its railway is located in part on that part of the street between the lots of Johanson and wife and the centre line of the street. An action of ejectment was brought by the Johansons against complainant, in the supreme court of this state, to enforce the removal of complainant's railway from that part of the street referred to. Judgment was rendered in their favor and the judgment was afterwards affirmed by the court of errors and appeals. *64 Atl. Rep. 1061*. The writ of ejectment is now in the hands of the sheriff of Camden county for execution. Complainant now seeks to enjoin the execution of that writ.

Mr. William T. Read and *Mr. Charles V. D. Joline*, for the complainant.

Mr. Francis D. Weaver and *Messrs. Bleakly & Stockwell*, for the defendants.

LEAMING, V. C.

This cause, as I view it, presents but a single question: Has complainant an estate in the *locus in quo* which will entitle it to the protection of a court of equity and of which it could not have availed itself as a defence in the action of ejectment.

Complainant asserts that, in the year 1875, the Gloucester Land Company was the owner of a large tract of land comprising the premises in dispute, and was also the owner of important manufacturing interests in that vicinity, and by reason of such ownership was desirous of having the railway in question pass over the route now in dispute for the purpose of enhancing

the value of its lands and manufacturing interests, and to that end requested complainant to abandon a more direct and less expensive route, which had been adopted, and to adopt the route desired by the land company, and agreed with complainant that if complainant would do so the land company would not charge for the land to be occupied and would convey the same to the complainant, and that complainant accordingly agreed with the land company to that effect and changed its route and constructed its road over the lands of the land company pursuant to that agreement (including the part of the route now in dispute) at a greatly increased cost to complainant, and that since that year (1875) complainant has been continuously operating its road over that route, but that the land company has never delivered the deed as agreed. No written agreement or memorandum was executed.

The pleadings admit that in the year 1886 the Gloucester Land Company conveyed the lots now owned by defendants to Esther E. Gibbon, by deed describing the lots as abutting on Salem street, and that in the year 1903 Esther E. Gibbon conveyed, by a similar description, to defendants.

If these allegations of the bill are to be at this time accepted as facts, complainant's position is that of a purchaser of lands, by parol agreement, with possession delivered by consent of the vendor, and with the agreed consideration of the purchase paid. The allegations of the bill fully cover these elements. The contemplated benefits to be received by the land company accrued to it by the location of the road as agreed, and the increased expenditures have been incurred by complainant as a consideration for the promised grant of the land occupied. The statute of frauds is not a bar to the existence of an equitable estate in the purchaser of lands under these conditions, for the contract has been fully performed upon the part of both parties except as to the delivery of the deed. *Young v. Young*, 45 N. J. Eq. (18 Stew.) 27, 34. The executed agreement, before delivery of the deed, constitutes the purchaser the owner of the equitable title to the lands, and the vendor holds the legal title as trustee for the purchaser. Courts of equity deal with these equitable interests as vested equitable estates in land. Before the contract

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is executed by conveyance the lands are devisable by the vendee, and descendible to the heirs as real estate, and the personal representatives of the vendor are entitled to any unpaid purchase-money. A purchaser from the vendor trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was. *Haughwout v. Murphy*, 22 N. J. Eq. (7 C. E. Gr.) 531, 546; *Brinton v. Scull*, 55 N. J. Eq. (10 Dick.) 747, 756.

Under the facts stated defendants must be regarded as purchasers with notice of the rights of complainant, as already defined. At the date of the conveyance from the land company to Gibbon, complainant had been in actual occupancy of the land for over ten years, and at the date of the conveyance from Gibbon to defendants for over twenty-five years. This visible possession of complainant operated to put defendants upon inquiry as to the rights under which complainant held possession. *Baldwin v. Johnson*, 1 N. J. Eq. (Sax.) 441, 455; *Dean v. Anderson*, 34 N. J. Eq. (7 Stew.) 496, 505; *Hodge's Executors v. Amerman*, 40 N. J. Eq. (13 Stew.) 99; *DeLuze v. Bradbury*, 25 N. J. Eq. (10 C. E. Gr.) 70; *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. (18 Dick.) 644, 668; *S. C. reversed*, 67 N. J. Eq. (1 Robb.) 610, 617.

An equitable estate of the character named is not available as a defence to an action of ejectment by the owner of the legal title. A trustee may recover in ejectment from his *cestui que trust*; the latter can make no defence at law, but must seek his remedy in equity. *Commissioners v. Johnson*, 36 N. J. Eq. (9 Stew.) 211, 212; *Nibert v. Baghurst*, 47 N. J. Eq. (2 Dick.) 201, 204; *Roe v. Reade*, 8 T. R. 122, 123; *Shine v. Gough*, 1 Ball & B. 436, 445.

It follows that complainant's bill is well founded unless another feature, not yet referred to, operates to defeat the equitable estate already defined. It must be, at this time, accepted as a fact that in the year 1875, when complainant contracted with the land company, the *locus in quo* was a public highway. The affidavits filed on behalf of defendants render it impossible, under the well-defined rules touching hearings for preliminary injunctions, to proceed upon any different assumption of fact.

It follows that the contract of the land company was to convey to complainant the fee in a public highway (at a time when the land company was the owner of the abutting property and owner of the fee of the highway subject to the public servitude), to enable complainant to construct and operate its railway longitudinally on the highway. I am unable to perceive that this fact operates to defeat complainant's right to assert its equitable title in this court for relief against the action of ejectment at law brought by defendants. While the operation of a steam railway longitudinally on a public highway is inconsistent with the use with which the land is burdened as a highway, and cannot be justified except by legislative authority (*Burlington v. Pennsylvania Railroad Co.*, 56 N. J. Eq. (11 Dick.) 259; 58 N. J. Eq. (13 Dick.) 547), yet the right of the abutting owner to maintain ejectment for its removal is necessarily based upon the fact that he is owner of the fee in the highway subject only to the public servitude, and is in no way based upon his right, as a member of the public, to remove the railway as a public nuisance. *Bork v. United New Jersey Railroad and Canal Co.*, 70 N. J. Law (41 Vr.) 268. It follows that if the equitable title to the fee in the highway in question passed to complainant from the predecessor in title of defendants, and defendants purchased with notice of such equitable title, equity should not permit an action at law which is wholly based upon the legal title and which action cannot take the equitable title into consideration, to dispossess complainant, until complainant shall have been privileged to assert his equitable title in this court as a bar to the possessory action. I know of no principle of law or policy which forbids the segregation of the fee of the highway from the abutting properties. A conveyance of land abutting on a highway embraces the fee to the centre of the highway only when a contrary intent is not expressed in the deed. *Salter v. Jonas*, 39 N. J. Law (10 Vr.) 469. I do not find *Atlantic City v. New Auditorium Pier Co.*, as reported in 67 N. J. Eq. (1 Robb.) 610, to militate against the view here taken that defendants were purchasers under conditions which charged them with the duty of making inquiry which should have resulted in the discovery of complainant's equitable estate in that part of the premises which

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defendants were purchasing which was occupied by the highway. In the decision referred to the view is forcefully expressed that nothing referable to the then existing physical conditions could have naturally suggested a covenant contemplating that the land and view below high-water mark of the ocean should remain unobstructed; that the absence of structures there was not naturally referable to restrictive covenants. The present case presents radically different conditions. The purchase which was being made by defendants included the land extending to the centre line of the highway, and I am unable to perceive how one can thus purchase property abutting upon a highway in which a steam railway is being longitudinally operated without being apprised of a probable right upon the part of the railway company emanating from a predecessor in title of the land in question. The purchaser could not properly attribute the occupancy to mere legislative permission, for such permission could not confer the right of occupancy until a corresponding right should have first been acquired from the owner of the fee.

The change of complainant's railway from a narrow-gauge to a broad-gauge road, in the year 1885, with a possible widening of the strip of ground actually occupied, cannot be held to operate to defeat complainant's present remedy. It is not clear that the additional ground which may have been occupied by the road by reason of this change of gauge was not covered by the spirit of the original agreement, and the deed from the land company to Gibbon was subsequent to this change. If, in this change of gauge, ties were lengthened beyond the length contemplated by the original agreement to convey, that fact is only important *pro tanto*. The writ sought to be enjoined runs against the entire structure.

It has been urged that the denial, in the answer, of the fact that the original agreement on which the bill is based was ever made, should operate to defeat the application for a preliminary injunction. The evidence of the original agreement, as disclosed by the bill and its accompanying affidavits, is not as satisfactory as might be desired. While I have not been entirely free from doubt as to its sufficiency, I have determined to accept it as competent to establish the facts averred. The effort on the part of

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defendants to negative these averments is wholly without probative force, as no positive knowledge is disclosed or claimed in the denials made. Under these circumstances the averments of the bill should not be treated as overthrown.

A preliminary injunction, in accordance with the prayer of the bill, will be advised.

WILLIAM H. FLATTAU

v.

ANNIE E. LOGAN and PATRICK J. LOGAN.

[Decided January 19th, 1907.]

A court of equity will not decree the specific performance by vendor of a contract for the sale of land when the vendor is not the owner of the equitable title of the land which he has agreed to convey.

On motion to strike out bill.

Complainant, as vendee, seeks specific performance, from his vendor, of a contract for the sale of certain lands in the city of Long Branch. Defendants move against the bill of complaint, pursuant to rule 213 of this court, upon the ground that the facts set forth in the bill disclose a contract upon the part of the vendor to convey lands of which he is not the owner, as well as a contract in which there is an absence of mutuality of obligation and which a court of equity will not, in consequence, enforce by its decree. The bill avers the execution of a contract in writing between the parties wherein defendants agreed to sell, and complainant to purchase, certain lands for a price and at a time named in the contract, free from all encumbrances or liens (except a certain mortgage which complainant agreed to as-

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sume), and that complainant made the first payment according to the terms of the contract and tendered the balance at the time named in the contract; and that defendants have failed to perform their agreement and claim that they cannot make a deed to the land free from encumbrances and liens because of the existence of a prior agreement, made by them and recorded prior to the agreement with complainant, wherein they agreed to convey the same land to another person; and also because of the pendency of certain condemnation proceedings in the supreme court for the appropriation of the land in question, in which cause a *lis pendens* was filed and recorded prior to the execution of the agreement with complainant. The bill avers the existence of the prior agreement and its record and the *lis pendens* and its record as prior in date to the agreement sought to be enforced, and prays that defendants may be decreed to convey the land in question to complainant freed and discharged of these liens and encumbrance.

Mr. John W. Slocum, for the complainant.

Mr. J. Fithian Tatem, for the defendants.

LEAMING, V. C.

It seems manifest that a decree of specific performance cannot properly be made in this case. If the prior recorded agreement for the sale of the land in question is a valid and subsisting agreement, and the bill does not suggest to the contrary, the equitable title to the lands has passed from defendants and they cannot be regarded as the owners of the lands which the bill seeks to compel them to convey to complainant. The pendency of the condemnation proceedings, in like manner, renders it impossible for defendants to convey the land to complainant in the manner agreed. It has been repeatedly held by this court that it will not decree the specific performance by a vendor of a contract for the sale of land where the vendor is not the owner of the land which he has agreed to convey. The inability of the court to enforce such a decree is alone a sufficient ground for

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its refusal to act in such cases. *Welsh v. Bayaud*, 21 N. J. Eq. (6 C. E. Gr.) 186; *Peeler v. Levy*, 26 N. J. Eq. (11 C. E. Gr.) 330; *Ten Eyck v. Manning*, 52 N. J. Eq. (7 Dick.) 47; *Hopper v. Hopper*, 16 N. J. Eq. (1 C. E. Gr.) 147, 149.

It is frequently said, in cases of this class, that inasmuch as the vendee cannot enforce specific performance against his vendor, who is without title, such a vendor will not be permitted to enforce the contract against his vendee. Contracts of this class are therefore frequently regarded as without that mutuality of obligation and remedy which should exist to entitle them to be specifically enforced at the instance of either party. *Ten Eyck v. Manning*, *supra*.

I find the motion of defendants to be well founded and will advise a decree dismissing the bill.

CHARLES H. JEFFREYS et al.

v.

SELINA A. CHARLTON et al.

[Submitted January 23d, 1907. Decided January 25th, 1907.]

1. There is no legal objection to an absolute conveyance of land and a simultaneous agreement by vendee to reconvey the land to vendor upon terms agreed upon. But equity is privileged to inquire beneath the external forms and to ascertain whether or not, in view of all the circumstances disclosed, the transaction was an absolute sale, or whether the conveyance was in fact intended as a security for the payment of the money specified in the agreement for reconveyance.

2. In the determination of the intention of the parties in such transactions, the fact that no obligation existed upon the part of vendor to pay the amount fixed as the price for reconveyance, is almost wholly inconsistent with the idea that the transaction was intended as a mortgage security. The fact that the amount paid by vendee was practically the entire value of the property is also inconsistent with the idea that a mortgage security was intended.

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3. Where, in such case, the agreement for reconveyance was in form and intent an option agreement wherein vendee extended to vendor the option to purchase within a specified time upon specified terms, such option must be complied with by the payment or tender of payment of the amount specified within the time named, or all rights under the option will be lost.

4. The fact that the conveyance was made by vendor at a time when the property was about to be sold under process of execution, and that the conveyance was made with a view that vendee should purchase the property at the approaching judicial sale at a price named and should extend to vendor the option of repurchase at that price, in no way enlarges the rights of vendor, where it appears from all the circumstances of the case that the transaction was intended by the parties as a sale and an option of repurchase, and not as a security for the repayment of the expenditures to be made by the vendee.

On bill and cross-bill.

The bill is filed by complainants as executor and devisees of Lewis E. Jeffreys to remove a cloud from the title to certain real estate, which cloud consists of an outstanding agreement dated July 3d, 1903, wherein complainants' testator agreed to extend to cross-complainant an option of purchase of the land, upon the terms specified in the agreement, for a period of two years from the date of the agreement. Defendant, by way of cross-bill, claims that under the agreement in question she is entitled at this time to an ascertainment of the money due to complainants under the terms of the agreement, and to a conveyance to her by complainants of the land in question upon the payment by her of the amount so ascertained. The agreement in question is an instrument wherein cross-complainant conveyed to complainants' testator certain real estate, and complainants' testator, in the same instrument, extended to cross-complainant an option of purchase, upon the terms stated, for a period of two years from the date of the agreement.

Messrs. Bourgeois & Sooy, for the complainants.

Mr. Harry W. Lewis, for the defendants.

LEAMING, V. C.

The primary question for determination is whether the transaction in question was operative as a mortgage from cross-complainant to complainants' testator, or whether it was operative as an absolute sale from cross-complainant to complainants' testator, with only an option of repurchase preserved to cross-complainant. If the former, cross-complainant's equity of redemption must be preserved to her; if the latter, cross-complainant was obliged to comply with the terms of the option within the period specified.

That part of the agreement wherein the right to repurchase is granted to cross-complainant is, in form, strictly an option, and if the language of the instrument is to be taken as the sole criterion to determine the rights between the parties, there is no equity of redemption preserved to cross-complainant in the event of her failure to comply with the terms of the option; but equity is privileged to inquire beneath the external forms in determining questions of this nature, and the controlling inquiry is whether or not, in view of all the circumstances disclosed, the transaction was an absolute sale, or whether the conveyance to complainants' testator was intended as a security to him for the repayment of the money set forth in the terms of the option. The determination of this question must, to a large extent, depend upon the circumstances of the individual case, for the question necessarily turns, in all such cases, upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence. Where a doubt exists the tendency of the courts, from motives of policy, has generally been in favor of treating the transaction as a mortgage security. In the present case death has intervened to deny to the court the benefit of the testimony of the parties to the transaction touching much that transpired at the time of the execution of the agreement, but sufficient evidence has been produced to disclose, with great fullness, the situation of the parties at the time and the purposes sought to be accomplished by the agreement made.

The property in question, at the time of the agreement, was about to be sold under decree of foreclosure, and the conveyance in question was made to complainants' testator with the view

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that he should purchase the property at the foreclosure sale and bind himself to convey the property to cross-complainant, providing cross-complainant should, within two years, pay to complainants' testator for the property the amount specified in the option. At the date of the agreement there was no indebtedness from cross-complainant to complainants' testator to be secured by this transaction. The agreement executed between the parties in no way bound cross-complainant to pay to complainants' testator the amount specified in the option. When, in a transaction of this nature, there is no obligation cast upon vendor to pay the amount fixed upon as the price for reconveyance, the conditions are almost wholly inconsistent with the idea of a mortgage security or a pledge to secure a debt. Professor Pomroy (*Pom. Eq. Jur.* § 1195) says: "If no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a sale and contract of repurchase." In the note to the text it is said: "The practical test is whether there is a liability, notwithstanding or independent of the conveyance and contract of reconveyance, which the grantee can enforce against the grantor." In *De Camp v. Crane*, 19 N. J. Eq. (4 C. E. Gr.) 166, 171, Chancellor Zabriskie says: "I admit the force of the position, so ably urged by counsel for the defendants, that when the question is whether the transaction constitutes a mortgage, or is a sale with an agreement to reconvey, the fact whether there is a continued debt or liability of the mortgagor is very important. It is difficult to conceive of a mortgage, which in its very essence is a pledge as security for a debt, without someone being liable for the debt. But I am not willing to say that there can be no mortgage without a debt, or someone being bound, at all events, to pay the money. A mortgage may be expressly made in that manner."

I am impressed, however, that where the transaction, in order to be treated as a mortgage security, must be so treated solely as the result of inferences drawn from existing circumstances contrary to the express stipulation of the parties, such inference cannot be logically indulged in the absence of an obligation upon the part of the vendor to pay. It is contended upon the part of cross-complainant that the agreement in question con-

templates a payment by cross-complainant of deficiencies arising from rentals; but I understand the language of the agreement, taken together, to mean that cross-complainant must make such payments to preserve the existence of her option during the two years, or otherwise lose it. I do not find in the agreement or transaction any stipulation or element upon which complainants' testator could base a claim against cross-complainant for the repayment of any part of the money which he expended in this transaction.

Another criterion helpful in the determination of the true spirit of a transaction of this nature is the relationship between the money paid and the value of the property. In the present case the evidence satisfies me that the expenditures made by complainants' testator were practically the full value of the property in question, or if not the full value, then so nearly the full value as to negative any suggestion of a loan on mortgage security. There is no legal objection to a transaction of the nature which this transaction assumed. Cross-complainant could lawfully convey her equity of redemption and could simultaneously receive from her vendee an option of purchase upon specified terms, and if the transaction was, in spirit and intent, what it purported to be on the face of the papers executed, then cross-complainant's equity of redemption in the premises was lost, and a title to the premises could only be acquired by her through a compliance with the terms of the option agreement. *Wallace v. Johnstone*, 129 U. S. 58, 65; *Slutz v. Desenberg*, 28 Ohio St. 371; see, also, *Pom. Eq. Jur.* § 1194, note 1, note "a."

In *Merritt v. Brown*, 21 N. J. Eq. (6 C. E. Gr.) 401, 405, the court of errors and appeals treated a transaction somewhat of this nature as one wherein the right of redemption would not be lost through failure upon the part of the vendor to pay on a day specified, but the view there taken was the result of a conclusion reached from testimony showing that to have been the intention of the parties.

My conclusion is that the instrument in question must be treated as correctly disclosing the true intention of the parties, and that the only right reserved to cross-complainant under that agreement was an option of purchase, and that her rights in the

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premises in controversy were lost unless she complied with the conditions of that agreement.

It is claimed upon the part of cross-complainant that she did comply, or offered to comply, with the provisions of the option agreement. If the failure upon the part of cross-complainant to pay to complainants' testator the money due to him occurred by reason of an honest difference between them as to the amount with which cross-complainant was properly chargeable under that agreement, such difference would undoubtedly excuse the non-performance within the time specified; but the evidence fails to convince me that such was the fact. The testimony of Mr. Wootton, who visited complainants' testator in behalf of cross-complainant, is to the effect that complainants' testator claimed, at that date, \$3,552.72 as due to him. The testimony of the widow of complainants' testator, which testimony is not questioned by Mr. Wootton, is to the effect that in arriving at the amount due to complainants' testator, his books and accounts were fully examined to ascertain the exact figures. There is no testimony showing that a protest was made, or that any dispute arose touching the amount claimed by complainants' testator. I am compelled to conclude that the failure of cross-complainant to comply with the terms of the option agreement was due to her neglect or inability to raise the money necessary for that purpose.

The cross-bill of defendant is for specific performance. The relief appropriately sought, under the claim now made by cross-complainant, would be that of a decree for the redemption of the property and for an accounting to ascertain the amount due. I have, however, treated the cross-bill as sufficient, under the prayer for general relief, to afford cross-complainant any relief which she might be entitled to in the premises. A decree will be advised for complainants.

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ATLANTIC CITY GAS AND WATER COMPANY

v.

CONSUMERS GAS AND FUEL COMPANY et al.

[Submitted January 15th, 1907. Decided January 23d, 1907.]

On bill for injunction.

Mr. Clarence L. Cole and *Mr. Robert H. McCarter*, attorney-general, for the complainant.

Mr. John C. Reed, *Mr. George A. Bourgeois* and *Mr. Charles L. Corbin*, for the defendants.

LEAMING, V. C.

By stipulation, filed January 15th, 1907, this cause has been submitted, on final hearing, upon the testimony taken before Vice-Chancellor Bergen on the motion for a preliminary injunction.

I concur in the views expressed by the learned vice-chancellor in his opinion filed September 9th, 1905, and reported in 70 *N. J. Eq.* (4 *Robb.*) 536, and will advise a final decree dismissing the bill of complaint.

2 Buck. Township of Landis v. Millville Gas Light Co.

THE TOWNSHIP OF LANDIS

v.

MILLVILLE GAS LIGHT COMPANY.

[Decided January 19th, 1907.]

1. A township may, by bill in equity, prevent the use of its highways by a gas company which is engaged in the act of laying gas pipes in such highways without legislative authority.

2. The relief granted to the township in such case may also prevent the use of the gas pipe already wrongfully laid in the highways of the township, when the pipe so laid has not been connected with buildings or brought into use.

3. The propriety of a resolution of a township committee authorizing the filing of a bill to restrain the use of its highways is a legislative and not a judicial question, and the exercise of such legislative discretion by the township committee will not be interfered with by this court in the absence of manifest fraud.

4. Defendant company held to be without legislative authority to occupy the highways of complainant township for the purpose of laying gas pipes therein.

On bill for injunction.

The bill is filed by the township of Landis to enjoin defendant company from laying its gas pipes in the highways of that township. Defendant claims the right under its charter act. *P. L. 1857 ch. 164*. The cause has been heard on bill and answering affidavits at the return of an order to show cause for a preliminary injunction.

Mr. Royal P. Tuller and *Messrs. French & Richards*, for the complainant.

Mr. Louis H. Miller and *Messrs. Gaskill & Gaskill*, for the defendant.

LEAMING, V. C.

In *Millville Gas Light Co. v. Vineland Light and Power Co.*, ante p. 305, the provisions of defendant's charter are quoted and considered at some length. Defendant's charter act granted to it the right to lay gas pipes in the streets of the "town of Millville and its vicinity." Millville was then (1857) an unincorporated village in the township of Millville, and the boundaries of the township of Millville at that time included the territory now comprising the township of Landis. In the opinion referred to the view is entertained that the language "the town of Millville and its vicinity," refers to the village of Millville and its vicinity, and not to the township of Millville and its vicinity. The view is also therein expressed that without something to show that the expression "Millville and vicinity" was intended to include more territory than would naturally be imported by that expression, the language could not properly be understood to include the entire township of Millville as it then existed. I still entertain the views expressed in that opinion, and I find nothing in the record in the present case to indicate a different legislative intent in the use of the language. Upon the record before me I feel obliged to hold that the rights conferred upon defendant company in the act of 1857 related to the territory then comprising the village of Millville and its immediate vicinity. In *Madison v. Morristown Gas Light Co.*, 65 N. J. Eq. (20 Dick.) 356, 358, similar language similarly used is commented upon as follows:

"Vicinity, as used in the statute, applies only to the streets, lanes, alleys and public places adjoining the village of Morristown. * * * The act of incorporation of defendant company is not difficult of construction. Its language construes itself. The company is incorporated to supply gas 'for the purpose of lighting the streets, buildings, manufactories and other places situated in Morristown and its vicinity.' Every building or other place in Morristown may be lighted. Buildings in the vicinity of Morristown may also be lighted. The intent was to give the defendant the right to lay gas pipes and light Morristown and the buildings or factories lying in its vicinity—that is, adjoining Morristown."

*2 Buck.**Township of Landis v. Millville Gas Light Co.*

The views expressed in the opinion quoted must, in the absence of distinguishing features, be accepted by this court as an authoritative declaration of the true significance of the language used in the act. It is unnecessary to here consider whether the word "vicinity" included all the territory now comprising the city of Millville, as that territory is not in dispute in this cause; but I am entirely clear that the word "vicinity," given the import already defined, cannot, in view of the physical conditions disclosed by the record, be reasonably treated as including any territory now embraced within the boundaries of the township of Landis. In 1857 the territory between the outskirts of the village of Millville and the point where the present boundary line of the township is located, a distance of one and one-half or two miles, was an outlying country district and unoccupied by any buildings except a few farm-houses, and substantially the same conditions appear to have existed in 1864 when the township of Landis was set off from the township of Millville. The territory now in dispute, extending from the boundary line northward toward the present borough of Vineland, was of substantially the same character. It would clearly be doing violence to the views expressed by the court of errors and appeals, above quoted, to hold that any part of this territory now in the township of Landis was contemplated by the language of the legislative grant in question, in view of the physical conditions then existing as disclosed by the present record. It follows that defendant must, at this time, be treated as without legislative authority to occupy the highways of the township of Landis for the purpose of operating its gas plant.

It is also urged, on behalf of defendant, that this court cannot properly forbid the use of that portion of the gas pipe which had already been laid in the township of Landis when the restraining order in this cause issued. The application for a mandatory writ compelling the removal of the pipe, already in place, will not be entertained before final hearing; but the conclusion already reached to the effect that defendant is without authority to occupy the highway in question with gas pipes, if sound, manifestly justifies this court in restraining defendant from taking the pipe into use as a part of its system. At present

the pipe merely occupies the highway at a place where the township is authorized to permit another company to occupy it. Should the pipe be now brought into use as a part of the system of defendant company and operated to supply gas to consumers along the line of the highway, the privilege enjoyed by the township to treat with or induce another company to occupy the highway for a similar purpose would be materially affected.

Defendant also urges that the record discloses that the present bill is not filed by the township in good faith, but that the bill is essentially one at the relation of an opposition company. I am unable to reach this conclusion. The propriety of the resolution authorizing the filing of the present bill is a legislative and not a judicial question, and the exercise of legislative discretion cannot be interfered with by this court in the absence of manifest fraud.

I will advise a preliminary injunction covering the scope of the present restraining order.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY.

OCTOBER TERM, 1906.

WILLIAM J. MAGIE, ORDINARY.
JAMES J. BERGEN, VICE-ORDINARY.

In the matter of the estate of WINIFRED GODFREY.

[Argued October 16th, 1906. Decided November 23d, 1906.]

1. When an application is made to an orphans court for an order directing an administrator to sell lands of his intestate for the payment of debts, on the ground that the personal estate is insufficient, under the provisions of sections 82 to 90 of the Orphans Court act of 1898, and upon the return of the rule to show cause issued thereon it appears that the personal and real estate of intestate are, and are known to the administrator to be, together insufficient to satisfy the debts claimed—*Held*, that the orphans court may decline to make the order of sale, because the application should have been made under sections 99 to 110 of the act, the estate being insolvent under those sections.

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2. The proofs before the orphans court justified the inference that the administrator, in making the application under section 82 *et seq.*, instead of under section 99 *et seq.*, acted in bad faith.—*Held further*, that the orphans court may decline to make the order of sale on that ground.

On appeal from Hudson county orphans court.

Mr. Edward Kenny, for the appellant.

Mr. James A. Gordon, for the respondent.

MAGIE, ORDINARY.

The appeal brings into review an order of the Hudson county orphans court, refusing to make an order for the sale of lands of Winifred Godfrey, deceased, by her administrator, for the payment of her debts.

The matter was first argued by briefs filed at February Term last. Upon taking up the papers for consideration, I found that the transcript did not disclose the ground on which the order objected to had been made. I therefore directed a reargument, in the hope that the opinion of the orphans court would be obtained and furnished me. It has now been reargued, but no opinion of that court is before me. I am therefore compelled to conjecture upon what ground the order was made.

The conduct of the case in the orphans court, as disclosed by the transcript sent up, was somewhat unusual. It thereby appears that, on July 8th, 1894, the administrator presented to the orphans court a petition for the sale of the lands in question, accompanied by a statement of the personal estate of the deceased and of the debts of deceased. The statement, which was sworn to by the administrator, showed that she left no personal estate, and that her debts for doctor's and undertaker's bills and other small items amounted to \$267.90, and that a claim of Catharine M. Godfrey had been made against the estate of deceased for \$3,598. Upon this petition a rule to show cause was made and brought to hearing on September 23d, 1904. The administrator was then sworn, and on his evidence it was clear that deceased had left personal estate amounting to over \$400,

*2 Buch.**Godfrey's Case.*

and that his affidavit to his statement was untrue. Thereafter, without any action upon the rule still pending, the administrator, on November 18th, 1904, presented another petition for the sale of the same lands, accompanied by a statement showing that deceased had left personal property to the amount of \$432.28 and debts of small amount as before, amounting to \$291.57, and the claim of Catharine M. Godfrey was included at \$3,598, with commissions and expenses (apparently estimated) \$100. As a result there was a deficiency claimed of \$3,557.19. Another rule to show cause was issued upon this petition, and although the proofs of publication as printed seem defective, yet when it was brought to hearing on January 27th, 1905, the sole heir-at-law appeared by her proctor, without objecting to the proofs, and opposed the granting of the order asked. Thereupon further testimony was taken, during which, upon a colloquy between court and counsel (no order being asked or made by the court), the administrator called Catharine M. Godfrey as a witness, and she was examined, without objection, respecting the particulars of her claim against the estate of the deceased. It thereby appears that her claim was made up of two items, one for money earned by her while a minor and handed to deceased, with whom she lived, amounting, it was said to over \$3,000, and the other for services rendered to deceased during her last illness. The precise amount of each claim of Catharine M. Godfrey is not disclosed in the printed case.

It further appeared that the administrator was the husband of the deceased and had left her many years before her death and never returned to her. When he left, two of his children by a former wife (one of whom was Catharine M. Godfrey) remained with deceased. Catharine M. Godfrey continued living with her stepmother until the death of the latter. She went to work when about eleven years of age, and, if her story be credited, she gave all her earnings to her stepmother. She was furnished with board and lodging by her stepmother during the whole period.

Catharine M. Godfrey further testified that her stepmother had told her, when she received her earnings, that after the stepmother's death "everything would be hers."

Upon all the proofs before the orphans court I draw the conclusion that the application of the administrator for the sale of the land was not in good faith.

The petitions were obviously made upon the sole ground that the personal estate of decedent was insufficient to discharge her debts. Such an application is made under the provisions of sections 82 to 90 of the Orphans Court act of 1898. *P. L. 1898 p. 744*. Yet both of them, when considered with the admissions of the administrator, distinctly disclosed that not only was the personal estate insufficient to pay the debts set up, but that all her estate, real and personal, was insufficient for such payment. The administrator swears, and produces evidence to the effect, that the land he seeks to sell is worth not over \$1,800. It will, obviously, be insufficient to pay the deficiency represented by the administrator.

The petition ought to have been made under the provisions now contained in sections 92 to 110 of the present Orphans Court act. *P. L. 1898 p. 752*.

The election by the administrator to proceed under section 82 *et seq.*, rather than under section 99 *et seq.*, was matter of serious importance to the heir-at-law acquiring title to the lands by descent. By the settled construction of the legislation now embodied in the former sections, the orphans court was without jurisdiction to settle disputed claims on the estate of decedent. *Miller v. Pettit*, 16 N. J. Law (1 Harr.) 421; *Vreeland v. Vreeland's Administrator*, 16 N. J. Eq. (1 C. E. Gr.) 512; *Smith v. Smith's Administrator*, 27 N. J. Eq. (12 C. E. Gr.) 445; *Partridge v. Partridge*, 46 N. J. Eq. (1 Dick.) 434; *S. C.*, 47 N. J. Eq. (2 Dick.) 601; *Pitcher's Case*, 61 N. J. Eq. (16 Dick.) 614.

If the administrator could elect to proceed under section 82, it will be observed that, upon the construction given to those provisions, the heir-at-law was powerless to contest any claim made upon the administrator, except by giving bond with security, under the provisions of section 89. In this case the heir-at-law would have been obliged to give security to pay over \$3,500, if established by action, in order to preserve from sale real estate worth no more than \$1,800.

On the other hand, if the administrator had applied, as he

could and ought to have done, to have the sale made under the insolvent estate sections of the act, it would have been open to the heir-at-law, as a person interested, to file exceptions to the claim and demand of Catharine M. Godfrey, under which Catharine M. Godfrey would have been compelled to submit her claim to the orphans court, unless she elected to submit it to the judgment of a court of law or equity. Sections 104 and 105.

Upon the proofs before the orphans court, if produced in the court of chancery upon a bill to restrain the administrator from selling the land upon such an order, I think that an injunction would have been granted. *Doll v. Cash*, 61 N. J. Eq. (16 Dick.) 108; *First Baptist Church v. Syms*, 51 N. J. Eq. (6 Dick.) 363; *S. C.*, 52 N. J. Eq. (7 Dick.) 545.

But was it necessary for the orphans court, upon these proofs, to proceed to make an order for sale of lands, and leave the heir-at-law to the expensive proceeding in equity to enjoin the sale, to enable him to contest a claim which he disputed? In my judgment it was not. In *Smith v. Smith*, *ubi supra*, that learned and practical judge, Chancellor Runyon, while admitting that in such a proceeding the orphans court, upon the settled construction of the legislation, was bound to accept the report of the administrator as to the amount of debts, added this significant exception, viz., "unless, indeed, the *bona fides* of his statement be assailed." In my judgment such an exception to the rule must be admitted, and I do not think it can be limited, on principle, to the two instances which he states, viz., whether the claims reported have been presented to him, or whether the amounts thereof have been misstated. Whatever shows a want of good faith on the part of the administrator in making the application may invoke the action of the orphans court.

In the case in hand want of good faith abundantly appears.

First. He refrained from proceeding under the insolvent estate sections of the statute, under which the heir-at-law could have excepted to any claims, and sought the order under the sections which practically debarred the heir-at-law from making any contest.

Second. He included in the claims some which he, as husband of decedent, was liable for.

Sternkopf's Case.72 Eq.

Third. He included therein the claim of his daughter. If she was unemancipated her earnings belonged to him. If he sought to recover them from his wife's estate obviously they would be subject to deduction for the support of his wife and daughter, which he admittedly had not furnished. If the daughter was emancipated, so as to be entitled to her own earnings, and to recover them from her stepmother or her estate, obviously they would be subject to deduction for her support and maintenance furnished by the stepmother. Yet the administrator admits the claim in full and seeks the order thereon.

There are other suspicious circumstances bearing on the good faith of the administrator in making this application, but the above seem to me sufficient to justify the orphans court in refusing to order a sale.

The order appealed from will, therefore, be affirmed, with costs.

In the matter of the probate of the last will and testament of
EDWIN STERNKOPF.

[Decided November 23d, 1906.]

Upon proof raising a presumption of death under the provisions of the act entitled "An act declaring when the death of persons absenting themselves shall be presumed," passed March 7th, 1797, the will of a person so presumed to be dead may be admitted to probate.

On application for probate.

Mr. Charles F. Kocher, for the proponent.

MAGIE, ORDINARY.

Charlotta Sternkopf has presented a petition for the admission to probate of the last will and testament of Edwin Sternkopf, her husband. The circumstances disclosed therein being unusual, she was directed to cite all the next of kin and heirs-at-

law of Edwin Sternkopf. On the coming in of the citations a guardian *ad litem* for an infant, one of the next of kin and an heir-at-law, was appointed, and the matter was heard before me on oral proofs.

The paper writing which was produced was proved to have been executed by Edwin Sternkopf on the 8th of October, 1897. Its execution was shown to have been accompanied with every circumstance required to constitute a valid testamentary disposition of property. But there was no direct proof produced of the death of the testator. There was ample proof to raise a presumption of death under the provisions of the act entitled "An act declaring when the death of persons absenting themselves shall be presumed," passed March 7th, 1797. *Pat. L. 241; 1 Gen. Stat. 1185.*

That act and the amendments and supplements thereto have been the subject of judicial consideration in many cases, and, so far as this application is concerned, I think it is thereby settled that the presumption arising upon proof satisfying the terms of the original act is a presumption of law, and that the death is presumed to have occurred at the termination of seven years from the time when the person was last heard from. *Wambaugh v. Schenck*, 2 N. J. Law (1 Penn.) 214; *Smith v. Smith*, 5 N. J. Eq. (1 Halst.) 484; *Osborn v. Allen*, 26 N. J. Law (2 Dutch.) 388; *Clarke v. Canfield*, 15 N. J. Eq. (2 McCart.) 119; *Hoyt v. Newbold*, 45 N. J. Law (16 Vr.) 219; *Plume v. Howard Savings Institution*, 46 N. J. Law (17 Vr.) 211; *Burkhardt v. Burkhardt*, 63 N. J. Eq. (18 Dick.) 479; *Meyer v. Madreperla*, 68 N. J. Law (39 Vr.) 258.

I have not been able to discover any instance of the admission of a will to probate in this court upon the mere presumption of the death of the testator arising under the statute. Nor have I been pointed to, nor discovered, any such proceeding by surrogates or orphans courts. Counsel refer to the case of *Plume, Administrator, v. Howard Savings Institution, ubi supra*, in which it seems that the letters of administration of the plaintiff were issued upon a mere presumption of death, and contend that if the presumption will support administration it will be equally effective for the admission of a will to probate. But the supreme

court was careful in that case to refrain from deciding whether or not the orphans court had a right to issue the letters of administration. What it decided was that the orphans court had jurisdiction of the subject-matter, and that its action thereon could not be attacked collaterally. The decision shed no light on the question here presented.

But although this question seems to be one of first impression, notwithstanding the statute was enacted over a century ago, I have, upon mature consideration, reached the conclusion that this application ought to be granted and the will admitted to probate.

My first doubt was whether the terms of the act of 1797 were extensive enough to embrace such an application. They raise the presumption of death upon certain proofs "in any case wherein his or her death shall come in question." It then declares that an estate recovered "in any such case" shall be restored to him or her if in any subsequent action or suit the person so presumed to be dead shall be proved to be living, and he may recover the rents and profits of the estate during the time he or she shall have been deprived of it.

It would seem that this act could have been interpreted as limiting the presumption which it permitted or required to "cases" in which the question of death was involved, and in which there could be a recovery of an estate and a process of eviction therefrom.

But the judicial interpretation in this state has recognized a meaning of broader import in its terms. It has been declared to be an embodiment in statutory form of the rule of the common law that on proof that a person had been absent from his usual abode without being heard from for the period of seven years his death be presumed. Our courts have therefore not limited its application to actions affecting real property, but have applied it to other matters.

In *Wambaugh v. Schenck*, *ubi supra*, it was unsuccessfully contended that the act did not extend to an action of dower, although that was a real action.

In *Smith v. Smith*, *ubi supra*, it was applied by the chancellor

2 Buch.Sternkopf's Case.

in a case in chancery involving the right to a dividend made by executors of the residue of the estate in their hands.

In *Osborn v. Allen*, *ubi supra*, it was deemed applicable in an action by a mother to recover compensation for the services of her son, in which she claimed to be a widow on the presumption of the death of her husband.

In *Clarke v. Canfield*, *ubi supra*, it was applied by the chancellor on a bill filed for the recovery of a legacy of money.

In *Burkhardt v. Burkhardt*, *ubi supra*, it was applied to a case arising under a bill for a decree that a marriage was null.

The subsequent case of *Spiltoir v. Spiltoir*, 64 Atl. Rep. 96, seems to indicate that the statute applies when the death of a person comes directly in question, but not where the issue is not raised by the pleadings or only appears incidentally.

In view of the long course of decisions relating to the applicability of the Death act, I think I would not be justified in excluding from its application the case presented before me by the petition for probate. And it is to be observed that by the direction of citations to the heirs-at-law and next of kin the petition must be treated as one for probate in solemn form.

If I had reached a different construction of the Death act it would not, in my judgment, necessarily result in the denial of the application.

While it is true that upon proof of the existence of a person at a particular time it must be presumed that he continued to exist thereafter until his death is proved, it has never been conceived that the proof of death must necessarily be direct. Obviously, upon proof of circumstances raising a counter-presumption, his death may be found. Thus, if he embarked on a vessel which was never afterward heard from, or which was proved to have been shipwrecked, at least under circumstances indicating the loss of all on board, there would be a question, after a reasonable time had elapsed, during which he had not been heard from, whether the presumption of the continuance of his life had not been overcome by the counter-presumption of his death in the shipwreck. The English courts seem to have adopted the period of seven years as indicating the reasonable period sufficient to raise the counter-presumption. In *Doe v. Jesson*, 6 East 80.

Lord Ellenborough applied such a rule on the analogy of the English statute respecting leases dependent on lives of *19 Car. II.*, and the statute respecting bigamy of *1 Jac. I.*, and seven years' absence unheard from seems to have been generally accepted as raising the counter-presumption, although there have been questions raised as to whether the presumption of death arose at the end of that period, or whether, when the time of death came in question, it must not be directly proved. But *In re Goods of Matthews, L. R. Prob. Div. 17 (1898)*, the English probate court, on proof of sufficient inquiries for the testator, who had disappeared, permitted his death to be sworn to three years after his disappearance.

In the case in hand the proof of the disappearance of the testator, that he had not been heard from since a few days thereafter, and that there had been continued and exhaustive searches and inquiries to ascertain his whereabouts, which were unsuccessful, is ample to overcome the presumption of his life and to raise a presumption of his death at this time, which is more than eight years after he was last heard from.

Another difficulty in taking jurisdiction to admit this will to probate on the proofs suggested itself to me on the examination of the more recent legislation. If, upon a presumption of the death of a testator arising under the statute, or otherwise, his will may be admitted to probate, such presumption would also apparently justify the issuance of letters of administration if no will were produced. Yet the legislature, by a supplement to the then existing Orphans Court act, approved March 23d, 1885 (*P. L. 1885 p. 116*), conferred power upon the ordinary, the orphans courts and surrogates, to grant letters of administration upon the estate of a person who, upon proofs, is shown to have absented himself, and has not been heard from for seven years. But no power is conferred to admit a will to probate and issue letters testamentary thereon upon such proofs. This legislation has been re-enacted in the Orphans Court act of 1898, in sections 30, 31 and 32. *P. L. 1898 p. 725*.

I am not inclined to attribute to this legislation the force of legislative determination that no power existed in probate courts to grant letters testamentary, or of administration, upon proofs

2 Buch.Sternkopf's Case.

raising a presumption of death under the statute, or otherwise, unless expressly conferred on them. By a supplement to the Death act of 1797, approved February 15th, 1848 (*P. L. 1848 p. 43*), it was enacted that the heirs or *devisees* of a person presumed to be dead, under the provisions of the act, might apply to the court of chancery and procure an order for the sale of the lands to which such person would be entitled if living, provision being made for accounting to him for the proceeds of the sale if he should appear and claim the same. By an amendment to this supplement, approved April 3d, 1891 (*P. L. 1891 p. 313*), the benefits of the act were extended to purchasers from such heirs and *devisees*. It is not necessary to determine whether these acts were effective in the attempt to convey the interest of the person presumably dead, but it is evident that the legislation recognized that there might be devisees of such a person, which necessarily involves the existence of an effective will competent to be admitted to probate. I am rather inclined to the view that the act of 1885 was designed to regulate the manner in which the estates of persons presumed to be dead should be administered and distributed upon security for repayment, if the person returned, and that conferring the power to issue letters of administration was incidental and out of caution.

The result is that the applicant is entitled to have this will admitted to probate, and to have letters testamentary issued to her as the executrix named therein.

In the matter of the application of THOMAS WHITAKER, executor of Sarah N. Garton, deceased, for sale of lands for payment of debts.

[Argued June 22d, 1906. Decided November 23d, 1906.]

1. Before an orphans court may make an order for the sale of lands of a testatrix to pay debts which her personal estate is insufficient to pay, the executor who seeks the order must have applied all the personal estate to their payment, including specific legacies. The legatee's right to contribution cannot be considered in the proceeding to sell land.

2. Upon such a proceeding it appeared in the orphans court that the testatrix died seized of a number of dwelling-houses and lots, valued by the executor at \$5,600; that the debts unpaid were \$1,287.37, and if a specific legacy should be applied they would be reduced to \$287.37, and that the sale of any two houses would raise the whole of the unpaid debts, and of any one house would raise the debts after application of the specific legacy.—*Held*, that the orphans court should have directed the sale of such houses as would have been sufficient and no more, and that the order requiring the executor to sell all the houses was erroneous, there being no evidence that the sale of any one or two of them would diminish the value of the others.

On appeal from the Cumberland county orphans court.

Mr. Louis H. Miller, for the appellants.

Mr. William A. Logue, for the respondent.

MAGIE, ORDINARY.

This application seeks the reversal of an order of the Cumberland county orphans court directing Thomas Whitaker, the executor of the last will and testament of Sarah N. Garton, deceased, to sell all the real estate of which she died seized, because her personal estate was insufficient to pay her debts.

On behalf of appellants, it is first contended that the order was made without any proofs such as are required by section 83 of the Orphans Court act of 1898. *P. L. 1898 p. 747*. But this objection cannot prevail. The order in question expressly recites

2 Buch.Whitaker's Case.

that on the return day of the rule to show cause, which had been previously made, the court heard and examined the allegations and proofs of the parties, and thereupon determined that testatrix's personal estate was insufficient to pay her debts. The printed case does not show what proofs were taken, but that none were taken cannot be inferred in contradiction of the express statement of the order.

It is next contended that the order is erroneous in that it directs testatrix's lands to be sold to raise a deficiency of \$1,287.37, although it appears by the order that the executor had not applied to the payment of the debts the sum of \$1,000 secured by a mortgage held by testatrix against lands in this state. If that sum could be collected by the executor upon the mortgage, and if he applied it to the payment of the debts, the deficiency would have been only \$287.37. There is nothing to show, and it was not asserted on the argument, that the mortgage was uncollectible. The failure of the court to require the executor to apply the sum secured thereby to the payment of debts before asking an order to sell appears to have been grounded upon an adjudication that the mortgage had been specifically bequeathed by testatrix to her daughter Sarah. The will of testatrix is printed in the case, and perhaps it may be inferred that it was among the proofs before the orphans court. It sustains the view that there was a specific bequest of that mortgage. But that fact, in my judgment, did not justify the executor in withholding it from application to the payment of debts, or the court in approving his conduct. The mortgage is personal estate in the hands of the executor, and must be applied to the payment of debts before any lands can be sold.

It is true that the rule is that for debts of a testator remaining undischarged after the application of his estate not specifically given specific legacies and the lands devised must contribute ratably. *Thomas v. Thomas*, 17 N. J. Eq. (2 C. E. Gr.) 356; *Langstroth v. Golding*, 41 N. J. Eq. (14 Stew.) 49; *Wiggins v. Wiggins*, 65 N. J. Eq. (20 Dick.) 417. But the jurisdiction of the orphans court to order a sale of lands to pay debts does not invest that court with power to determine and enforce the equities of contribution between the devisees and the

legatees of a specific bequest. By the statute lands are to be sold only for debts remaining undischarged after the application of the personal estate. If a specific legacy is thereby exhausted, the legatee may doubtless enforce her equity to require the devisees to aid in repairing her loss by making payment of their proper proportion thereof.

It may be added that the order, in exonerating the legatees from having her mortgage primarily applied to debts, and so casting the whole of the debts upon the lands, reverses the scheme of the act, and would require the devisees to seek contribution out of the specific legacy.

In this respect the order is erroneous.

It is next contended that the order is erroneous in that it directs the executor to sell all the lands of which testatrix died seized.

The petition of the executor discloses that testatrix died seized of three double dwelling-houses and lots in Cumberland county, and of two halves of double dwelling-houses and lots in Gloucester county, to which the executor fixed a valuation amounting to \$5,600. These were all devised to different people, and are all ordered to be sold to raise \$1,287.37. The executor is further ordered to apply to the Gloucester county orphans court for an order to sell the lands that lie in that county, pursuant to the provisions of sections 83 and 84 of the Orphans Court act of 1898. *P. L. 1898 p. 745.*

The order was made apparently on two grounds, and if they justify a sale of over \$5,000 worth of lands to pay less than \$1,300 of debts, they would equally support a sale of all of them to pay the \$287.37 which will remain after the application of the mortgage to the debts.

One ground is that all the real estate devised should contribute ratably to the payment of debts. This is no doubt a correct statement of the equities of the parties, but the statute gives no authority to the orphans court to work out those equities, or to direct the sale of all the real estate for that purpose. On the contrary, it expressly directs that no more thereof shall be sold than is sufficient to pay the debts (except under one specific condition), and then by the last clause of section 95 it enacts that

2 Buch.Whitaker's Case.

any devisee whose lands devised have been sold for the payment of debts of his devisor may compel others holding under the testator to contribute in proportion to their respective interests, so as to equalize the burden or loss. I do not think it possible to find in this enactment any jurisdiction conferred upon the orphans court to entertain actions to compel contributions. If such jurisdiction was intended it obviously gives no support to this clause of the order. The right to contribution protected thereby is a right in a devisee whose lands have been sold, and the act gives no color of power to adjust the equities by a sale of all the lands.

The other ground upon which the order complained of was made was that a part of the lands could not be sold without manifest injury to the devisees. By a proviso in section 83, *ubi supra*, the previous direction that no more lands should be sold than may be necessary to pay the residue of debts after application of the personal estate in the hands of the executor was doubtless modified. The court had been previously required to determine whether the sale of a part of the lands would be sufficient, and if so, to specify the part to be sold. If, however, it appeared that the sale of a part which would be sufficient would diminish the value of the remainder, discretion was given to sell more or the whole. For example, if the lands consisted of a farm, the size of which, or its division into arable or other land, affected its market value, the sale of one part of it, though ample to pay the debts, might seriously diminish the value of the remainder. In such and similar cases discretion is given to sell the whole.

But, in my judgment, this provision gives no authority for the sweeping order of sale presented in the case now in hand. It is obvious that the sale of one of the double houses would raise the sum of \$1,287.37. At the valuation of the executor, the sale of any one of the houses would raise \$287.37. There is nothing to indicate that the sale of any one would diminish the value of the others. The plain reason disclosed for directing the sale of all the houses by the order was that it was deemed that thereby contribution could be worked out between the parties, but that is again subversive of the scheme of the legislation, which, in sub-

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jecting to sale a sufficient part, gives the devisee a right to compel contribution in money. Here, in order to compel contribution, the other devisees are by this order deprived of the land devised.

For both of the errors above mentioned, the order must be reversed.

CORNELIA WHEEDON, administratrix, &c., appellant,

v.

AUSTIN NICHOLS et al., respondents.

[Argued October 16th, 1906. Decided December 26th, 1906.]

1. A personal representative, administering an insolvent estate under the statute, may present his own claim against the estate, and, unless it is made to appear to be dishonest or fraudulent, may be admitted to participate in the distribution of the assets on the same footing as other creditors.

2. When a claim against an insolvent estate is excepted to, the orphans court has jurisdiction to adjudicate thereon, unless the claimant elects to proceed against the personal representative at law or in equity. When such election is made by a third party the personal representative is not bound to interpose the bar of the statute of limitations.

3. As a personal representative who has presented his own claim against the estate cannot elect to proceed at law or in equity against himself, the jurisdiction of the orphans court cannot be taken away; but if the claim of the personal representative against the estate is not made to appear to be dishonest or fraudulent, the orphans court cannot disallow it solely on the ground that the statute of limitations has run against it.

On appeal from Monmouth county orphans court.

Mr. Acton C. Hartshorne, for the appellants.

Mr. Henry M. Lummis, for the respondents.

2 *Buch.*Wheedon v. Nichols.

MAGIE, ORDINARY.

This is an appeal from an adjudication of the Monmouth county orphans court made upon the following case.

The estate being administered was insolvent, and the administratrix (who was the mother of the intestate) filed her statement of the assets and claims, and included among such claims one made by herself against the estate. Creditors excepted to her claim, and when the matter came on for hearing before the orphans court the exception was allowed, and the claim of the administratrix was disallowed. This is the adjudication complained of.

On the part of the respondents it is first contended that there was no proof made before the orphans court that the note of the intestate, which was the subject of the claim of his administratrix, had been made by him and delivered to his mother. The proofs before the orphans court do not seem to be contained in the state of the case. If they were preserved they ought to have been included therein. But I think this objection cannot be successfully interposed. The conclusions of the judge of the orphans court declare that the exception interposed was to the allowance of a note made by the intestate, and held by his mother, the administratrix, and that the note is for the sum of \$800, and bears date November 1st, 1895. The note must therefore have been produced by the administratrix, and the presumption is that it was proved to be the note of the intestate. The administratrix producing it was entitled to be paid the amount of it, unless the objections on which the orphans court disallowed it ought to prevail.

The court found that the intestate died June 24th, 1903. This is conceded to be correct. The statute of limitations had, therefore, run against the note before the death of the intestate, if the note was payable on demand (as is claimed), and proper demand had been made within a reasonable time. What, in fact, was the due day of the note has not been made to appear. The finding of the orphans court judge was that the note was barred by the statute of limitations, and that, in the absence of proof that something was done by the intestate to take the note out

of the statute, the administratrix had no right to claim its allowance with the other claims against the estate, or to waive the statute of limitations in favor of her own claim, when the estate was being administered as an insolvent estate.

If an estate is solvent, it admits of no doubt that a personal representative may waive the statute of limitations as to any claim of a third person, and be allowed in his accounts for the payment of a claim against which the statute had run. *Pursel v. Pursel*, 14 N. J. Eq. (1 McCart.) 526; *First National Bank v. Thompson*, 61 N. J. Eq. (16 Dick.) 202; *Vreeland v. Vreeland's Administrator*, 16 N. J. Eq. (1 C. E. Gr.) 528.

A personal representative may also acknowledge an obligation against which the statute has run, or promise to pay the obligation so as to take the case out of the statute, provided the acknowledgment or promise is made in conformity with the provisions of the statute. *Hewes v. Hurff*, 69 N. J. Law (40 Vr.) 263.

When the personal representative has a claim against the estate which he is administering, it is impossible for him to enforce the claim by action at law or in equity. In such case it is well settled that he may exercise the right of retainer for the satisfaction of his claim if the claim be honest. If the indebtedness was originally honest, it is not rendered dishonest by the running of the statute for the prescribed period. As such a representative may, with impunity, decline to interpose the bar of the statute against an honest debt remaining unpaid, I think he may exercise the right of retainer to satisfy his own claim if of that character. Of course, in such cases, the action of the personal representative diminishes the estate to the injury of the residuary or other legatees or the next of kin.

It is insisted in argument that, because the estate is insolvent, the right of a personal representative in respect to his claim upon the estate is different from his right in respect to a claim upon a solvent estate.

It admits of no doubt that the personal representative cannot retain the whole of his claim as against other creditors. He must come in on an equality with other claimants of the same degree. *Dolman v. Cook*, 14 N. J. Eq. (1 McCart.) 56.

The administration of an estate which is insufficient to pay all the debts of the deceased owner is now governed by the provisions of the subdivision of the Orphans Court act of 1898, entitled "Insolvent estates," and contained in section 99 *et seq.* *P. L. 1898 p. 752*. By those provisions any claim properly presented to the personal representative of the estate must be reported by him to the orphans court, and may be excepted to by the personal representative or by any person interested. If excepted to the orphans court may hear proofs and decree and determine in regard to such claim, unless the claimant elects to proceed against the personal representative by action at law or suit in equity, which he is permitted to do under section 105 of said act.

If the claimant whose claim is excepted to is a third party, and elects to proceed at law or in equity, the personal representative is not bound to interpose the statute of limitations as against the claim if he admits it to be honest. There is no provision in the act by which the exceptant, or any others, may compel the personal representative to interpose the statute. Nor is there any provision that permits the exceptant, or any others, to intervene in the action at law or suit in equity and make defence to the claim.

When the personal representative is himself a claimant upon the estate, of course no action at law or in equity can be brought.

If a personal representative cannot be compelled by the exceptant to a claim upon an insolvent estate, to interpose the statute against the claim of a third person, there seems no valid reason why the statute should be held to operate as a bar to an honest claim of the personal representative, which is necessarily tried before the orphans court. It is true that the admission of the claim, notwithstanding the statute has run against it, will diminish the dividend to the other creditors; but such would be the result if, in an action at law brought by a claimant under section 105, the personal representative did not interpose the bar of the statute. The creditors have no greater rights than have legatees or distributees of a solvent estate, whose interests are diminished by the failure of the personal representative to set up the statute. It is doubtless true that, in some states, a dif-

ferent view has been taken, but my examination of those cases indicates that the legislation in those states is different from ours.

In *Pursel v. Pursel*, *ubi supra*, Henry W. Green, ordinary, approved the disallowance in the account of an executor of a credit claimed for a book-account of the executor against the testator, because the bulk of it was barred by the statute of limitations in testator's lifetime, and the proofs raised every presumption against the justice of any part of the claim. The statement that the claim was barred by the statute was, of course, inadvertent, for the statute only bars the action if interposed by the plea or otherwise. What that learned judge intended to express was undoubtedly this, viz., that the claim of the executor upon the estate of the testator was unjust and dishonest, one ground for such determination being the fact that if the claim had been sued on in the lifetime of testator he could have interposed the bar of the statute. But, obviously, that ground would not have operated upon the rest of the claim, and there were other circumstances that convinced him that the whole claim was dishonest.

In the case in hand the note claimed by the administratrix was dated more than six years before the maker's death. It is said to have been payable on demand. Whether the statute had run against it at his death does not appear from the proofs in the case printed. If it did appear it would not, without other proof, justify the inference that the claim was dishonest, and, so far as appears, there was no other proof.

It results that the decree appealed from must be reversed and the administratrix's claim must be decreed to be admitted and allowed.

2 Buch.Moore's Case.

In the matter of the probate of the last will and testament of
DANIEL MOORE, deceased.

[Argued October 22d, 1906. Decided January 15th, 1907.]

The transcript of the proceedings in the orphans court shows that the will offered for probate had been revoked by a subsequent will having variant provisions, and also containing an express revocation of former wills, and that the subsequent will had been burned by the testator with intent to revoke it.—*Held*, upon authority of the decision in this court in *Randall v. Beatty*, 31 N. J. Eq. (4 Stew.) 643, that the revocation of the subsequent will did not revive the former will, in the absence of circumstances indicating that such was the intent of testator. *Held further*, that the circumstances proven raised no inference that testator intended to revive the former will, but such intent was negated by the proofs, and therefore that the will offered for probate was properly rejected.

On appeal from Hudson county orphans court.

Mr. Robert S. Hudspeth and *Mr. Edward Kenney*, for the appellant.

Mr. Michael T. Barrett and *Mr. Francis Child*, for the respondents.

MAGIE, ORDINARY.

The appeal in this case is from a decree of the orphans court of Hudson county, refusing to admit to probate a paper writing propounded as the last will and testament of Daniel Moore, who died in that county on November 9th, 1903.

The paper writing offered for probate purports to be dated December 12th, 1882. If it was executed by Daniel Moore, the case shows by uncontradicted evidence that, subsequent to that date, he executed several wills. The last one was executed between October 9th and November 14th, 1900. It was drawn by Michael T. Barrett, at the request of Daniel Moore, and was executed in the manner required by our statute. This will being of later date than the paper offered for probate, and disclosing a

scheme for the disposition of his property variant from that appearing in this paper, operated as an indirect revocation of the former will. It is also made to appear that it contained an express revocation of all former wills.

By the second section of the "Act concerning wills," passed November 16th, 1795 (*Pat. L. 189*), it was provided that no devise or bequest in writing shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself, or in his presence, or by his direction or consent. It was further therein provided that all devises and bequests shall remain and continue in force until burnt, canceled, torn or obliterated, or unless the same shall be revoked or altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more subscribing witnesses, declaring such revocation or alteration.

The legislation was re-enacted in the revision of 1846. *Stat. p. 363; Rev. p. 1243*. By a supplement to the revised act, approved March 12th, 1851 (*3 Gen. Stat. p. 3760*), it was provided that a will could be effectively executed before two witnesses. In consequence, it was further provided that written revocations of wills should be executed in the same manner as wills are required to be executed, and "when so made shall be sufficient to revoke any last will or any part thereof."

If this legislation were now to be reviewed for the first time, I should be inclined to the view that its language in respect to the revocation of a former will by the execution of a later will was adopted to express the indirect or implied revocation thus resulting, and that its language, in respect to revocation by the execution of another writing declaring the revocation, was adopted to express the direct or express revocation thus resulting. This distinction between express and implied revocation was pointed out by Henry W. Green, ordinary, in delivering the opinion of this court in *Smith v. McChesney*, 15 N. J. Eq. (2 McCart.) 359, and by the same learned judge when chief-justice, in *Snowhill v. Snowhill*, 23 N. J. Law (3 Zab.) 447.

Upon this construction of the statute it might be well maintained that the execution of a later will, impliedly revoking a

2 Buck.Moore's Case.

former will and containing a clause expressly revoking all former wills, would satisfy both of these clauses of the statute. It is true that the statute declares that the express revocation is to be by "other" writing, which may mean a writing which is not a will. But if that meaning is attributed to the words, I think, but for a construction given them in a case in this court presently to be mentioned, the words of revocation, though contained in a will, might be held to satisfy the statute as "other writing," because such a clause has no testamentary character, and is not a testamentary disposition intended to take effect only at the death of the testator leaving the will unrevoked, but to operate and take effect at once.

In other states this view of an express revocatory clause contained in a subsequent will has been declared by courts of high repute. *Pickens v. Davis*, 134 Mass. 256; *James v. Marvin*, 3 Conn. 576; *Scott v. Fink*, 45 Mich. 246. Like views have been expressed in the courts of states having provisions for the revocations of wills similar to those in our legislation. *In re Cunningham*, 38 Minn. 169; *Cheever v. North*, 106 Mich. 393.

The case in this court in which a different view was expressed was decided by Runyon, ordinary, and was *Randall v. Beatty*, 31 N. J. Eq. (4 Stew.) 643. It appeared that the decedent, whose testamentary disposition was in question, died leaving a will, executed in 1870. In 1873 she executed another will containing a revocatory clause. The will of 1873 was afterward canceled and decedent retained the will of 1870 in her possession. The learned ordinary held that the will of 1873 did not revoke that of 1870, because the revocatory clause was testamentary in character, and its cancellation revived the former will retained by her.

In the case under consideration the evidence makes it clear that Daniel Moore burned and destroyed the will drawn for him by Mr. Barrett, with intent to revoke it. It was urged in the argument in the court below, and the same argument has been made here, that by the burning and revocation of the later will, the former paper writing, if the will of the deceased, was thereby, *ipso facto*, revived, without considering whether or not the testator, by such revocation, intended to revive the previous will.

For the respondents the contention is, *first*, that the construction of the revocatory clauses of the wills statute was erroneous, but *second*, that if it was not erroneous or is binding upon this court, in the present case, the circumstances proved clearly indicate that Daniel Moore did not, in fact, intend to revive or re-establish any former will. In *Randall v. Beatty*, *ubi supra*, Chancellor Runyon admits that it must appear, in order that the revocation of a later will shall operate to revive a former will, from the circumstances surrounding the transaction, that the testator intended to revive the former will.

Assuming then that such construction of the statute of wills is correct, it admits of no doubt, in my judgment, that Daniel Moore in this case, if he did execute the paper writing in question, did not intend that it should be revived by the destruction of the will drawn by Mr. Barrett and executed by Mr. Moore in 1900.

The will construed in *Randall v. Beatty* had been retained by the testatrix, kept with her husband's will in the place of deposit for her valuable papers, and was found there at her death, and this circumstance was seized upon to indicate that when she destroyed a will of later execution she intended to revive the will which she had preserved so carefully.

In the case now under consideration the paper writing claimed to be the will of Daniel Moore was not retained by him in the place in which he kept his important papers, and to which he frequently resorted for examination of them. On the contrary, if the singular story of the discovery of this paper writing is credible, he had practically thrown the paper away, or delivered it, without explaining its contents, along with old letters and papers, to a young woman who passed as his daughter, on the eve of her marriage, which was shortly after the execution of the Barrett will. The paper had been partially burned, and by such burning one of the clauses devising valuable property is rendered incapable of being read. It is a fair conjecture, however, that it is intended to be a provision for his wife Hannah, who was living at the date of this paper writing. It is incredible that, at the time of the destruction of the later will, he could

*2 Buch.**Moore's Case.*

have an intent to revive that clause, for his wife had been dead for some years and he had married again.

Upon the whole evidence I find no ground upon which an intent to revive can be inferred, but, on the contrary, I think it clear that he did not intend to revive this paper writing, if it ever was his will.

The decree must, therefore, be affirmed on this ground.

The very extraordinary account given of the discovery of this paper writing, and the extraordinary discrepancies appearing in it, might, perhaps, justify a denial of its admission to probate on the ground that the right of heirs-at-law will not be taken away except upon clear proof of a testamentary disposition of the decedent's property. But as the other ground is found to justify the affirmance of the decree below, no opinion will be expressed on this subject.

Let the decree be affirmed. Counsel may be heard before the decree is signed, if they desire, on the question of the allowance of costs and the expenses of the appeal.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY
ON APPEAL FROM THE COURT OF CHANCERY,
AND THE PREROGATIVE COURT.
NOVEMBER TERM, 1906.

AUGUST SEASTREAM et al., complainants-appellants,

v.

NEW JERSEY EXHIBITION COMPANY, respondent-defendant.

[Submitted December 11th, 1906. Decided March 4th, 1907.]

1. A decree of the court of chancery adjudging one guilty of contempt of that court in attempting to improperly influence the due administration of justice therein, rendered in proceedings instituted solely for the purpose of vindicating the dignity and authority of the court, is not reviewable except for want of jurisdiction in the court.

2. A proceeding to punish for contempt was begun by an order directing the accused persons to appear in court at a time specified and show cause why they should not be adjudged guilty. The order was based on affidavits setting forth the acts charged as contempt, consisting of an attempt to improperly influence the administration of justice in such court. The order and affidavits were served on them. On the return day

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proofs were taken on the charges and in defence thereof.—*Held*, that as the persons were informed of the charges, and were afforded an opportunity to meet them, the court had jurisdiction of the proceeding.

3. Where one charged with contempt of court voluntarily offered himself as a witness on the hearing, and was examined by his counsel, and submitted without objection to cross-examination by counsel appointed by the court to prosecute the charge against him, he could not urge that the court subjected him to examination and cross-examination without authority.

4. A vice-chancellor has authority as a master of the court of chancery to take testimony of witnesses produced before him in a proceeding to punish one for contempt of the court of chancery, and submit the same to the chancellor for adjudication.

On appeal of Griffiths and others, from a decree of the court of chancery, reported in 69 *N. J. Eq.* (3 *Robb.*) 15.

Mr. Warren Dixon, for the appellants.

Contra, *Mr. Frank P. McDermott* and *Mr. Robert H. McCarter*, attorney-general.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

The appeal in the present case is from a decree in chancery adjudging the appellants guilty of contempt of that court in attempting to improperly influence the due administration of justice therein in the above-stated cause, and imposing upon each of them a fine of a specified amount.

Two reasons are assigned for reversing the decree—*first*, that the court of chancery was without jurisdiction to make it; and *second*, that it was not justified by the proofs submitted to the court.

The second ground cannot be availed of on appeal. The proceeding was instituted solely for the purpose of punishing the alleged contemnors, to vindicate the dignity and authority of the court. Such a proceeding is not reviewable by an appellate tribunal, except for the lack of jurisdiction in the court in which the proceeding is had. *Dodd v. Una*, 40 *N. J. Eq.* (13 *Stew.*) 714; *Frank v. Herold*, 64 *N. J. Eq.* (19 *Dick.*) 371.

Turning to the consideration of the other reason assigned for a reversal of the decree—namely, lack of jurisdiction—it needs no argument to demonstrate that the court of chancery has jurisdiction to investigate an alleged attempt to improperly influence the due administration of justice in a case pending before it, and to punish the offenders if they are proved to be guilty. In fact it is not contended otherwise by the appellants. The principal ground upon which they assert lack of jurisdiction is that they were never informed of the specific charge made against them, nor afforded an opportunity to meet it. Our examination of the case satisfies us that the fact is otherwise. The proceeding was begun by an order which directed the several appellants to appear in court at a time specified, and show cause why they, or some of them, should not be adjudged guilty of contempt in attempting to improperly influence the due administration of justice in the above-cited cause. This order was based upon affidavits which plainly set forth the acts charged against them. Both the order and the affidavits upon which it was founded were served on each of the appellants. Upon the return day of the order proofs were taken before one of the vice-chancellors in substantiation of the facts set forth in the affidavits, and afterward the appellants submitted testimony in denial of those facts. It is difficult to conceive how a more complete opportunity could have been afforded them of knowing the exact nature of the charge against them and of meeting it.

It is further asserted that the proceeding was *coram non judice*, "because the accused appellants were not called before the court of chancery to respond, but were brought before his honor, Vice-Chancellor Pitney, who subjected them to examination and cross-examination without authority."

This assertion, like the preceding one, is not borne out by the fact. It is true that, upon the return day of the order, the chancellor himself was not present in court, and that Vice-Chancellor Pitney sat in his stead. It is also true that the testimony in support of, and in contravention of, the charges which were the subject-matter of the proceeding was taken before him. It is not true, however, that the learned vice-chancellor subjected the appellants to examination and cross-examination without

authority. They, each of them, offered themselves as witnesses in their own behalf, voluntarily, and were examined by their respective counsel. They submitted themselves, without objection, to cross-examination at the hands of counsel appointed by the court to prosecute the charges against them. Even if it be assumed, as argued by counsel for the appellants, that the learned vice-chancellor was without power to hear and determine the subject-matter of the investigation (although we incline to the view that such assumption is unwarranted), he, nevertheless, had full authority, as a master of court, to take the testimony of the witnesses produced before him, for the purpose of having it transcribed and submitted to the chancellor for his consideration and adjudication. And this, in fact, was the course pursued by him. In order to avoid any challenge to the existence of power upon his part to pass upon the matter of the alleged contempt of the appellants, he submitted the whole of the testimony taken before him to the chancellor himself, and the latter officer, after an independent examination of that testimony, and upon his own judgment, without advice from the vice-chancellor, made the decree appealed from. The legality of such a course of proceeding seems to us too plain to be questioned.

The decree appealed from will be affirmed.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

2 Buch.McGuinness v. McGuinness.

MARY E. MCGUINNESS, respondent,

v.

THOMAS MCGUINNESS, appellant.

[Argued November 28th, 1906. Decided January 8th, 1908.]

1. A wife sued for divorce, for the custody of the children, and for alimony. The husband, a non-resident, was only brought in by publication and personal service out of the state of a notice of the pendency of the suit. He did not appear. A decree as prayed for was granted. His property in the state was sequestered to enforce the decree. He filed a petition attacking the validity of the decree for lack of jurisdiction, and prayed for the vacation thereof, for the setting aside of the writ of sequestration, and for the dismissal of the bill, and for "other and further relief."—*Held*, that his appearance for this purpose was not a general submission to the jurisdiction of the court, and did not operate to give validity to the adjudication against him of which he complained.

2. An award of alimony, in a decree for divorce, whether absolute or from bed and board, is void against a defendant who has not been served with process within the state and has not entered an appearance in the suit; and is not enforceable against property of defendant within the state.

On appeal from an order of the court of chancery, reported in 71 N. J. Eq. (1 Buch.) 1.

Mr. Howard Carrow, for the appellant.

Mr. Clarence Kelsey, for the respondent.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

On July 7th, 1899, the complainant, Mrs. McGuinness, filed a bill in the court of chancery against her husband, seeking a decree divorcing them *a mensa et thoro*, and awarding to her the custody of their children, and requiring him to provide suitable

support and maintenance for herself and her children and to pay a proper amount for counsel fees during the suit. The husband, a resident of the State of Pennsylvania, was brought in, not by service of process, but by publication, and a personal service, out of the state, of a notice of the pendency of the suit. He did not appear to the suit and a decree *ex parte* went against him, granting the complainant the relief prayed for by her bill and directing him to pay to the complainant the sum of \$1,890, being an amount equal to the payment of \$19.23 per week from the time of the filing of the bill to the date of the making of the decree (which was May 18th, 1901), and also to pay her the sum of \$19.23 per week from the date of the decree until the further order of the court for the support and maintenance of herself and their three children. The defendant, having failed to comply with that part of the decree which directed the payment of moneys by him, a writ of sequestration was issued against him, under which certain properties belonging to him in the city of Jersey City were sequestered and the income therefrom appropriated to the payment of those moneys. The defendant then filed a petition setting out that he was, at the time of the institution of the suit, a resident of the State of Pennsylvania; that no jurisdiction had been obtained over him by the court in the suit for divorce, and that he had no knowledge that the bill of complaint prayed for the permanent alimony or counsel fee until after a decree had been signed in the case. The petition then alleged that for those reasons the final decree should not have been made and that the writ of sequestration should not have been issued, and prayed

"that the enrollment in said cause be opened; that the final decree and all orders therein be opened and vacated, and that the subpoena *ad respondendum* and the service thereof, together with the writ of sequestration, be set aside, and that the complainant's bill be dismissed, and for such further and other relief in the premises as may be agreeable to your honor."

After hearing, the petition was dismissed by the chancellor; and from the order of dismissal this appeal is taken.

The sole ground upon which the relief sought by the petition

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was asked by the defendant was the lack of jurisdiction of the court of chancery. The conclusion reached by the chancellor was, that so far as the question of the jurisdiction of the court for the purpose of granting a divorce *a mensa et thoro* against the defendant was concerned, it had been obtained over him by the service upon him, out of the state, of the notice of the pendency of the suit; that for such purpose it was not necessary there should be an actual service of process; that reasonable notice, given to him outside of the jurisdiction, affording him an opportunity to come in and defend, was all that was necessary in order to make a valid decree of divorce against him, and that this he had received. He further considered that the power to decree a divorce, and so break up the family relationship, carried with it as a necessary incident the power to adjudicate with relation to the custody of the offspring of the marriage, and award such custody to either the father or the mother, as the interests of the children should require. I concur in the view of the chancellor that, to the extent indicated, jurisdiction was obtained over the defendant by service of notice out of the state and in the reasons which led him to that conclusion, as expressed in his opinion.

Having reached the conclusion that the court had acquired jurisdiction over the defendant for the purpose of decreeing a divorce of the parties and awarding the custody of their children to the complainant, the learned chancellor proceeded to consider whether the defendant was entitled to a revocation of so much of the decree as imposed upon him the payment of the moneys specified therein, and of the subsequent proceedings had for the purpose of enforcing that part of the decree, and concluded, that even if the court was without jurisdiction to decree alimony against the defendant at the time when the decree was made, its annulment should be denied him, for the reason that by seeking to have vacated, not merely the order for alimony and its incidents, but the whole decree, and all the proceedings which led up to it, including a dismissal of the bill of complaint, and by praying "for further and other relief," the defendant had submitted himself to the jurisdiction of the court upon the whole case. The doctrine upon which this conclusion is rested is thus

formulated by the learned chancellor: "A defendant, who, claiming that the court in which a suit against him is pending, has not acquired jurisdiction over him, attacks the jurisdiction, even under a special appearance, will be held to have submitted himself to the jurisdiction if, under such appearance, he seeks some relief upon the merits."

The doctrine appealed to, it will be perceived, applies *in terms* only in cases where the defendant has appeared in a pending litigation, but it was considered by the chancellor that the reason upon which it rested was equally applicable where the defendant sought to challenge the validity of a judgment already entered, upon the ground that jurisdiction had not been acquired over him; and the numerous cases cited by him in support of this view fully bear him out.

I have no criticism of the rule which declares that a defendant, who in one breath challenges the jurisdiction of the court in a pending suit, and, in the next, asks relief against the plaintiff on the merits in the same litigation, submits himself generally to the jurisdiction, for I can imagine no more potent act of submission by a party defendant in a pending suit than the asking that affirmative judicial action be taken in his behalf for meritorious reasons. And, indeed, as the chancellor points out in his opinion, this court has already committed itself to the doctrine in the case of *Polhemus v. Holland Trust Co.*, 61 N. J. Eq. (16 Dick.) 654. The view, however, that the effect of an application to set aside a void judgment for meritorious reasons, which is refused consideration by the court, operates to give life to the judgment, and converts it into an outstanding obligation against the defendant, seems to me of doubtful soundness. When a defendant, over whom the court has not acquired jurisdiction, appears in a pending suit and seeks relief upon the merits, he afterward has his day in court; he may contest the plaintiff's claim, and if the form of the litigation permits it, may even have an affirmative judgment in his favor. His appearance confers upon the court jurisdiction to *proceed* to judgment. But a defendant who appears in court for the purpose of obtaining relief against a judgment which is *coram non judice*, and seeks that relief both upon jurisdictional and upon meritorious grounds, never has had his

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day in court, if a hearing on the meritorious question is denied him. The judgment at the time when he appears is a nullity. If he seeks to have it declared void solely upon the ground of want of jurisdiction in the court to pronounce it, the court must so declare it. If he further asserts that on the merits of the case the judgment should never have been rendered against him, and asks to have it vacated, and an opportunity afforded him of being heard on the merits, on what theory of law is it to be said that he has, by this act, given life to a judgment which before had no legal existence, and by the same act has forever barred himself from the right to have it opened, no matter how complete a defence he may have had to the suit upon the merits? I am inclined to think that, in order to render jurisdiction complete, there must be not only the offer of the defendant to submit himself to the jurisdiction by praying relief from the void judgment upon meritorious grounds, but also acceptance of the offer on the part of the court by a consideration and determination of the meritorious question presented.

But, as I view the present case, it does not involve a determination of the soundness of the view upon which I have commented, and any declaration upon it would be *obiter*. The defendant challenged the proceedings which he sought to have set aside upon the sole ground of lack of jurisdiction; and he asked for no relief upon any other ground, either meritorious or non-meritorious. His appearing in court for the specific purpose of challenging the jurisdiction, was, under the cases, not a general appearance to the suit, and that without regard to whether his challenge was successful or not. If altogether successful he would have been entitled to a nullification of all proceedings subsequent to the filing of the bill. If altogether unsuccessful his failure would have been due to the fact that the court had already acquired jurisdiction over him for all purposes of the litigation, and his appearance could not, therefore, operate to confer jurisdiction. The fact that his challenge was well founded as to a part of the decree and ungrounded as to another part could, it seems to me, no more operate to validate that part of the decree which it was beyond the jurisdiction of the court to pronounce than to invalidate that portion of the decree which the

court had power to make against him. Legal rights are not destroyed by the mere assertion that they are more extensive than they afterward turn out to be upon investigation.

Concluding that the defendant is not barred by his course of procedure, there remains the question whether an award of alimony in a decree of divorce *a mensa et thoro* is void against a defendant who has not been served with process within the territorial limits of the state and has not entered an appearance in the suit. It has been frequently held, since the decision of *Pennoyer v. Neff*, 95 U. S. 714, that an award of alimony contained in a decree for absolute divorce is void under such circumstances, and for the reason that it is a judgment *in personam* within the meaning of that decision. But it is suggested that the peculiar character of a proceeding for a limited divorce, which leaves the marital relation unbroken, and recognizes the right to enforce the husband's duty to support his wife and family, takes an award of alimony made therein out of the rule of *Pennoyer v. Neff*, at least to the extent of rendering it enforceable within the state. The suggestion does not commend itself to me. The allowance of alimony in a suit for divorce, whether the divorce sought be *a vinculo* or *a mensa et thoro*, is made, as is stated by Justice Pitney in *Lynde v. Lynde*, 64 N. J. Eq. (19 Dick.) 751, 752, "as a means of enforcing the continuing duty of support which the husband owes to the wife, and of which he is not permitted to absolve himself by his own misconduct, even though that misconduct results in a dissolution of the marriage." By our statute, as is pointed out in the same case (at p. 754), "alimony on a divorce *a vinculo* is placed on the same basis as that which is allowed on a divorce *a mensa et thoro*. Both are provided for by the same section of the act, and both are placed within the discretion of the court of chancery so far as concerns their adjustment, from time to time, according to the varying circumstances of the parties." The personal character of the judgment is as marked in the one case as the other.

It is further argued that although unenforceable outside of the state, a decree for alimony is enforceable within our jurisdictional limits against property of the defendant by force of the provision of our statute which authorizes the sequestration of

2 Buch.Vulcan Detinning Co. v. American Can Co.

such property for the purpose of raising the moneys awarded by it. But clearly if a judgment *in personam*, rendered against a person over whom the court has not obtained jurisdiction, violates the fourteenth amendment of the federal constitution, as was declared in *Pennoyer v. Neff*, and is for that reason absolutely void even in the state where rendered, as is declared to be the case in *Haddock v. Haddock*, 201 U. S. 567, no legislation of that state can operate to give it life.

The order appealed from will be reversed.

For reversal—THE CHIEF-JUSTICE, GARRISON, HENDRICKSON, SWAYZE, TRENCHARD, VREDENBURGH, VROOM, GREEN, GRAY, DILL—10.

For affirmance—None.

THE VULCAN DETINNING COMPANY, appellant,

v.

AMERICAN CAN COMPANY et al., respondents.

[Argued November 22d, 1906. Decided July 2d, 1907.]

1. The maxim, "One who comes into equity must come with clean hands," is based upon conscience and good faith, and the bad faith or the unconscionable conduct that will justify the application of this maxim must be based upon actual knowledge or willful fraud. The fraud of an agent that is by mere imputation chargeable upon a complaint will not render the hands of the latter unclean within the meaning of this maxim.

2. "Unclean hands," within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a court of equity, as a court of conscience, will not even listen, because the conduct of such suitors is itself unconscionable in the moral sense that imports actual knowledge.

3. The complainant purchased from a concern in Holland a process for the successful detinning of tin scrap which was unknown in this country, the secret of which is zealously guarded. After the success of the process had been demonstrated, one of the complainant's original directors, charged as such with the duty of secrecy, and who moreover held in individual trust for the complainant a copy of the formula of its process, became the president of the defendant corporation, and, with the assistance of certain discharged employes of the complainant, installed for the defendant corporation, as a competitor of the complainant, the process so purchased by the latter. Upon a bill filed to enjoin this inequitable competition, and to restrain the further publication of the complainant's process—*Held*, (1) that the quondam director of the complainant should be enjoined because of his breach of trust; (2) that the defendant corporation should be enjoined because the knowledge of its president was imputable to it; (3) that the discharged employes of the complainant should be enjoined under the rule laid down in this court in the case of *Stone v. Goss*, 65 N. J. Eq. (20 Dick.) 756. *Held*, also, that, assuming that the complainant had not acquired a title to its process that was good as against the discoverer thereof, and also that the process itself was not absolutely a secret one, the complainant, upon general principles of equity, is entitled as against its wrong-doing trustee, and others chargeable with notice, to protect the qualified secrecy of such process that arose from such relation of trust and confidence.

4. The knowledge of an agent, casually obtained, is chargeable to a principal by whom he is afterward employed whenever the principal, if acting himself, or (if a corporation) when acting through some other agent, would in the natural course of events have acquired the knowledge or have been put upon such inquiry as was the equivalent of notice.

5. The case of *State v. Sooy*, 41 N. J. Law (12 Vr.) 394 approved and applied. The case of *Willard v. Dentse*, 50 N. J. Eq. (5 Dick.) 483, overruled.

6. If a trustee purchase a title that cures or completes one that he holds in trust, the presumption in equity will be that the later purchase was made in aid of the former trust.

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Bergen, whose conclusions are reported in 70 N. J. Eq. (4 Robb.) 588.

Mr. Robert H. McCarter, attorney-general, and Mr. Henry Wollman and Mr. Albert S. Seidman (of the New York bar), for the appellant.

Mr. Richard V. Lindabury, for the respondents.

The opinion of the court was delivered by

GARRISON, J.

The bill of complaint in this case was dismissed by the court of chancery upon the sole ground that the complainant did not come into court with clean hands. The facts upon which this determination rests, as stated in the conclusions of the learned vice-chancellor, are briefly these: The process which it was the object of the complainant's bill to enjoin the defendants from using or making public was the discovery of the Goldschmidt Brothers of Germany, and was as early as the year 1891 in successful operation at their factory in Essen, Germany, where it was guarded by its discoverers as a secret process. A large part of the tin scrap used by the Goldschmidts at this factory was shipped to them from New York by the firm of A. Kern & Company, of which Adolph Kern was the head. As early as 1892 the advantages of the erecting of a detinning plant in this country were seen by Mr. Kern and led him to enter into an extended correspondence upon the subject with the Goldschmidts, which culminated in the submission to them of a proposition looking to the establishment of their process in this country under a corporate enterprise in which they should take stock. After considerable correspondence this proposition was definitely declined by the Goldschmidts by a letter of May 7th, 1897, the concluding paragraphs of which are as follows:

"When one considers further that detinning is much dearer in America than here, as wages are higher and chemicals more expensive, it is clear that an establishment in America cannot compete with those in this country. I consider, under these entirely changed conditions, the establishment of a factory over there is a mistake, and not able to exist, and consequently I will not take any part whatever in such an enterprise.

"Very respectfully,

"TH. GOLDSCHMIDT."

In the course of this correspondence Dr. Goldschmidt had in a letter of May 16th, 1896, stated that his process was being used at Vlissingen, Holland, by a concern called the Tinfabriek which had been organized for this purpose by one Laernoës, who had clandestinely obtained the secret of the process. It does not

appear that Kern ever communicated this piece of information to anyone except to Laernoës himself some two years later. From this time both of these detinning plants, namely, the Goldschmidts at Essen and the Tinfabriek at Vlissingen, drew upon this country for their shipments of tin scrap, and as a great part of this refuse material was obtained by Kern from the tin can factories near New York, the attention of the proprietors of these factories was also directed to the desirability of having a detinning plant of their own if the process of its successful operation could be obtained. This community of interest brought together Kern and these manufacturers, and resulted in a tentative agreement for the promotion and financiering of such a project, provided the process used by their foreign customers could be obtained by negotiation. This matter was entrusted to Kern, who, knowing from his correspondence with the Goldschmidts that they regarded the enterprise as entirely unfeasible, went directly to Vlissingen (of which the English name is Flushing) and there met Laernoës and ascertained from him the terms upon which the co-operation of the Tinfabriek could be had. This was in 1898. An option embodying these terms was secured by Kern, who, after visiting other factories at Kempen and Urdingen where less productive processes were used, went to Essen in a final endeavor to enlist, if possible, the Goldschmidts in the American venture, but without success. The net results therefore of Kern's visit to Europe was his option with the Tinfabriek, which, upon his return to New York, he accepted in the name of A. Kern & Company, with whom it had been made, and later transferred to the Vulcan Metal Refining Company, a corporation of this state, and one of the underlying companies of the present complainant.

Under the terms of this executed option the Tinfabriek installed the process in question at two factories of the complainant in this country, receiving therefor in cash and capital stock a sum approximating \$200,000.

To restrain the defendant Assmann (who was one of the original corporators who made this purchase) and the defendant corporation of which he is president from using or making public

this process in violation of an alleged trust between Assmann and the complainant is the main object of the present bill.

[From these circumstances and others detailed by the learned vice-chancellor he reached the conclusion that the process used by the Tinfabriek was a fraud upon the Goldschmidts, of which Kern by reason of his correspondence with Dr. Goldschmidt in 1896 had knowledge, and that when Kern, in 1898, became the agent of the corporators of the complainant through whom the Tinfabriek process was acquired, the prior knowledge Kern had thus casually obtained must be imputed to the complainant under the decision of this court in the case of *Willard v. Denise*, 50 N. J. Eq. (5 Dick.) 482. Having reached this conclusion as to the imputation of Kern's knowledge to the complainant, the vice-chancellor further concluded that the effect of such imputation was to render the hands of the complainant unclean within that maxim of equity by which a deaf ear is turned to a suitor in a court of conscience regarding a matter in respect to which his own conduct has been unconscionable.

In reaching this last conclusion the learned vice-chancellor fell, we think, into the error of ascribing an unconscionable status to the complainant by force of a presumption of remedial law that in its most extreme application affects only the legal rights of parties and not at all their moral standing. That the knowledge possessed by an agent, but not acquired by him while acting for his principal, will under certain conditions be imputed to the latter, is in the nature of a presumption indulged in by courts in working out the rights of litigating parties. It is never a rule of evidence by which the actual possession of knowledge by the principal can, in point of fact, be established. On the contrary, an essential part of the presumption in question is that the principal is ignorant of the knowledge that has been casually acquired by his agent; hence, by the hypothesis, the principal is not only ignorant of the knowledge thus acquired, but if such knowledge involves a fraud, the principal is innocent of such fraud. True, he may be bound by it in the sense that his legal rights may be determined with reference to the knowledge with which he is thus chargeable, but his conscience is void of offence, and hence it cannot with any propriety be said

that his hands are unclean, for "unclean hands" within the meaning of the maxim of equity is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen because the conduct of such suitors is itself unconscionable, *i. e.*, morally reprehensible as to known facts. The entire ineptitude of the presumption respecting imputed knowledge to relegate the complainant in the present case to this reprobated class must, we think, be apparent. As was said by the Kentucky court of appeals, speaking through Mr. Justice Burnham (afterward chief-justice): "The maxim, 'one who comes into equity must come with clean hands,' is based upon conscience and good faith." *American Association v. Innis*, 109 Ky. 595.

Upon the ground stated we think that the learned vice-chancellor committed error, without regard to the pertinence of the maxim of clean hands, to the knowledge that he imputed to the complainant or to the propriety of such imputation.

Our conclusion as to this branch of the case leads to the reversal of the decree below, unless the respondents are entitled to hold the decree upon the merits of the case which the court below because of its ruling as to the complainant's status did not find it necessary to pass upon, but which on this appeal counsel on either side have had the prevision to argue with great fullness.

The testimony taken in the case although very considerable in extent does not present any especial difficulty as regards the material facts. Stated succinctly and in unargumentative form the facts as we find them to be from the testimony are these: Prior to 1898 the detinning of tin scrap had not been successfully carried on in this country for the reason that the process by which such waste material could be so treated that both the iron and the tin, of which it is composed, could be separated and made commercially profitable was unknown here. Such a process was, however, in successful operation at Vlissingen, in Holland, by a concern called the Tinfabriek, a fact that was known to shippers and dealers in tin scrap in this country, among whom were Adolph Kern, a shipper, and Franz A. Assmann, a manufacturer, and to others in the same line of business. These dealers also knew

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that detinning was carried on at Essen, in Germany, but Kern alone knew, from the private sources already referred to, that the Goldschmidts claimed that they were the originators of the process and that the Vlissingen concern had pirated their secret. The legitimate profits of detinning, at a home plant, the tin scrap that was thus being exported to Europe induced these American dealers in that material, in the year 1898, to agree amongst themselves to subscribe the necessary capital to financier such an undertaking in corporate form, if the secret of the process that was being successfully operated abroad and the right to use it could be obtained. This mission was entrusted to Kern, whose visit to Europe, on this errand, has already been alluded to. The practical result of Kern's mission, so far as the promoters of the proposed corporation are concerned, was that it was successful and was followed up immediately by the execution of the option that Kern had obtained with Tinfabriek and the installation by that concern of two detinning plants for the American corporators, for which the Tinfabriek received in cash and capital stock, that was soon worth more than par, a sum that fell little short of \$200,000. The rights of the two corporations, for which these plants were originally installed, have since been acquired and are now represented by the complainants. Of the good faith of the American corporators in the transaction which involved the payment of this large sum of money no legitimate doubt is raised by the testimony. Whether the prior knowledge possessed by Kern made his conduct fraudulent as to the Goldschmidts so that in a suit brought by them such fraud would be imputable to these corporators is a question that does not concern this present controversy. It should be noted, however, that there is a wide difference between the absolute secrecy which the discoverer of a process has the legal right to protect and the qualified secrecy which the complainant claims the equitable right to secure. That the complainant carefully guarded such secret as it had acquired is amply proved in the case; that Assmann as one of the original promoters and one of the first directors of the complainant was especially impressed with the importance of so guarding the process is shown in the testimony in many ways, one only of which need now be mentioned, namely,

that he himself became, individually, the depository of a copy of the formula of the process for the express purpose of guarding it for the mutual benefit of himself and his associates. The enterprise conducted upon these lines was from the very first a success, both practically and commercially, and so continued until the year 1901, in which year Assmann transferred his personal business as a manufacturer of tin cans to a corporation created in that year, namely, the American Can Company, the defendant corporation in the present suit. Upon the organization of this company, Assmann became its president, sold out all of his holdings of stock in the two detinning companies, resigned his directorship in each, and became the leading spirit in the installation for the American Can Company of two plants using a process of detinning similar to the complainant's, having called to his assistance for this purpose three former employes of the complainant, who, together with Assmann and the American Can Company, are the defendants to the present bill.

The testimony admits of no other rational conclusion than that the detinning plants that thus came into existence in competition with the complainant's are employing the process originally purchased by the complainant, which Assmann had undertaken to safeguard in its interests. That this result was brought about by a breach of confidence upon Assmann's part toward his original associates both as regards the use of the process itself and the enticement of the former employes of the complainant into his scheme is also the only legitimate inference that can be drawn from the proofs; that in both of these respects he was acting directly on behalf of the defendant corporation, of which he was both president and agent, follows as a necessary deduction.

Having reached these conclusions as to the effect of the testimony, the question arises whether, upon these facts, the complainant is entitled to any relief and if so to what extent and of what nature. Counsel for the defendants, with much confidence, argues that the complainant is entitled to no relief because the secret process it seeks to enjoin the defendants from using is not in fact a secret, and secondly, because if it is a secret the legal title to such secret is not in the complainant. The perti-

nence of these propositions to the present controversy depends, to a great extent, upon the precise nature of the equitable relief the complainant is warranted in claiming. When the complainant's bill was filed in the court of chancery, it was immediately challenged by the defendants by a demurrer upon the claim that no grounds for equitable relief were disclosed by the bill. The pleading thus directly attacked was sustained in a carefully considered opinion by Vice-Chancellor Reed, an examination of which will show that the propositions now relied upon by the respondents were substantially the grounds then advanced and disposed of in the court below. *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. (1 Robb.) 243.

The conclusion set out in the opinion of Vice-Chancellor Reed need not be here rehearsed, since it is sufficient for present purposes to say that their general purport was that inasmuch as neither party stood in the shoes of the discoverer of the secret process, and as the complainant was not claiming under the Goldschmidts but under the Tinfabriek, the rights that the former might set up would not avail the defendants to justify a breach of trust toward the complainant respecting a matter that, so far as the parties before the court were concerned, was traceable to a common source—in fine, that the equity of the bill rested upon principles generally applicable to trusts and not upon rights peculiar to the discoverer of a secret process. After this conclusion was filed, namely, June 13th, 1904, an assignment and license from the Goldschmidts to the defendant corporation, dated October 17th, 1904, was made. The effect of this instrument was, of course, not directly involved in the decision in question, but as far as it went the decision was the law of the case and placed the equity of the bill upon an alleged breach of confidence respecting a secret process and not upon any inherent property in such process.

Looking now a little more closely at the nature of the relief called for by the complainant's case, which we are not enabled to do in the light of the issues that have been actually tried, we shall see, I think, that too much emphasis has perhaps been placed upon the element of absolute secrecy in the process, and that not enough stress has been laid upon the inequitable character

of the defendant's conduct in making a use of such process that was inimical to the complainant's interests.

What I wish to point out is that the real gravamen of the complainant's bill, as amplified in the proofs, is not that the defendants are threatening to destroy the value of an absolutely secret process by imparting it to the public, but that the defendants, while keeping the secret of the process to themselves, are making a use of it that is inequitable as to the complainant, as shown by the testimony, and the complainant ought to be protected from the inequitable competition to which it has been exposed by a breach of confidence. Incidental to this relief, and resting upon the same equitable jurisdiction, is the restraining of the defendants from publishing the process itself, of which, however, there is no proof of any present threat or intention. Indeed, as long as the present state of affairs exists, such publication would be equally injurious to both parties and for the same reason, namely, because of the competition to which it would expose the business in which each is at present engaged. I am not suggesting that the complainant is not entitled to an injunction enjoining publication, for I think that it is, but I am now saying that the main ground for relief disclosed by the complainant's case is the existence of inequitable competition arising from a breach of trust, and hence referable to general principles of equity and not to those special doctrines by which unpatented secrets are protected. In the application of these general principles the secrecy with which a court of equity deals is not necessarily that absolute secrecy that inheres in discovery, but that qualified secrecy that arises from mutual understanding and that is required alike by good faith and by good morals. It is proper to say here that the plea that absolution should be granted by courts of equity from the observance of such private obligations whenever the public will thereby be the gainer cannot for a moment be entertained. The language of Justice Brown, cited in the brief of counsel, namely, "It is as important to the public that competition should not be repressed by worthless patents as that the patentee of a really valuable invention should be protected in his monopoly." has, as I read the case of *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224, no such im-

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port in the context in which it stands in Mr. Justice Brown's opinion. The notion that the multiplication of worthless patents inflicts as great an injury upon the public as the multiplication of worthless citizens would do can never, I fancy, be accepted by a court of equity as a sound proposition on which to base a doctrine absolving trustees from the observance of their trusts.

The conclusion to which the foregoing considerations lead is that entirely aside from the technical secrecy of the process or the abstract question of property therein, the complainant is entitled to have its trustee, his associates and their servants restrained from using against the interests of the complainant the very process with which its trustee was entrusted for its benefit. It is further worthy of note upon this question of the secrecy of the process that apart from the peculiar rights of its discoverer, the secrecy of a process may be viewed in two aspects, *first*, as having for its object the keeping of the public in ignorance of the nature, source or composition of a commercial product that is put upon the market; and *second*, as having for its object the prevention of competition by rivals in production. The first of these aspects has sole regard to the public as prospective purchasers, the second has reference solely to rivals in probable competition. In the case before us publication by the complainant's trustee would, of course, violate the obligation of secrecy in each of these respects, but as regards the second, namely, prospective competition, such trust is equally violated if the trustee himself uses the secret to engage in such competition, even though, as would clearly in that case be to his interest, he sedulously kept the secret to himself excepting so far as his selfish use of it required the co-operation of associates and servants. To this the trustee might indeed answer, "It is true that I agreed to keep your secret from others, but I did not agree that I would not myself make use of it in competition with you." But it is not likely that a court of equity would regard such answer as in anywise ingenious or exculpatory. The present case rests, as it seems to me, largely upon the distinction thus indicated. The secrecy maintained by the original purchasers of the process in question was not in order that the public might not know what it was buying, but that the profits of production

should not be cut by rivals. It was unquestionably to this end that the process was sedulously guarded by Assmann and his original associates and by Assmann as a personal trustee of its formula. When therefore Assmann severed his connection with the complainant and installed the process in question for the defendant corporation as a competitor in production, it is the same in equity as if without having severed such prior connection he had broken faith with his fellows by imparting to a rival the secret which he had promised to preserve. The jurisdiction of equity in such case, whether the breach of trust be actually beneficial to the wrong-doing trustee or only injurious to his *cestui que trust*, is too familiar to justify the citation of authorities.

This being so, as to the defendant Assmann, the complainant contends that the same facts and the same equitable doctrine require that the same relief be decreed against the defendant corporation, for whom Assmann was acting when he did the acts that constitute his breach of trust with the complainant. This contention is undoubtedly correct if the defendant corporation knew or had notice that Assmann held the secret of the complainant's process in a confidential or trust capacity, for in that case it became itself a trustee for the complainant, at least to the extent of being enjoined from using the process or making publication of it. It is all but impossible to avoid the conclusion that the directors of the American Can Company had actual knowledge of sufficient facts to constitute such notice. The community of interest in the tin scrap trade, the sudden cessation of the wholesale exportation of such scrap, the new domestic market opened for it by the establishment of the complainant's plants, the fact that the complainant, alone in this country, was able, successfully, to treat the scrap, and the personal knowledge of the actual facts by some of the leading spirits in the organization of the defendant company, almost compel the conclusion that the history of the complainant's process and of Assmann's connection with it were known to the management of the American Can Company when it ventured its capital in the enterprise engineered by its president. It is all but impossible to demonstrate, by direct proof, that a corporation has knowledge apart

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from the knowledge possessed by the agencies through which its functions are performed; hence, the mere fact that the complainant is unable to adduce any corporate resolution of the defendant expressly asserting its knowledge of the complainant's secret and of Assmann's connection therewith does not prevent our reaching the conclusion that the defendant had such knowledge, if such is the inference to which the testimony, by irresistible weight of probability tends. Had these facts been found by the court below, where the witnesses were orally examined, and the testimony reviewed *in extenso* by counsel, I can see no ground upon which such finding could be reversed. The circumstance that we are now required in the first instance to find this important fact from a mass of printed testimony, occasions the only hesitation I feel in deciding this question adversely to the respondents without first looking at the case as it would stand if proof of actual notice were admittedly lacking.

The doctrine invoked by the complainant upon this latter assumption is that a constructive trust arises where one receives trust property without actual notice of the trust, but also without paying for it a valuable consideration. By force of this doctrine it is claimed that the defendant corporation became a trustee of the complainant because it did not pay a valuable consideration to Assmann for the secret process he installed for it. The difficulty in the way of applying this doctrine to the facts of the present case is that, while the American Can Company did not pay anything to Assmann, it did expend large sums of money in exploiting the process he secured for it, and this expenditure if innocently made, that is, if made without notice, would constitute an equitable consideration that would take the case out of the doctrine that is thus invoked. So that upon the assumption that the can company did not have actual notice of the circumstances that constituted its president's breach of confidence with the complainant, it is not amenable to the relief the complainant now seeks, unless by force of Assmann's agency in procuring the process for it, such knowledge as he possessed is by imperative presumption to be imputed to the defendant corporation. The nature of this presumption has been incidentally referred to in an earlier part of this opinion, where, how-

ever, it was found necessary to say no more than that being a rule of remedial law, such presumption had no application to the maxim of clean hands. Now, however, in applying this presumption to the remedy claimed by the complainant against the defendant corporation, we are called upon to consider it in its proper function.

The scope, and to some extent, the theory of the presumption of imputed knowledge has been the subject of two decisions in this court which are not in accord. I refer to *State v. Sooy*, 41 N. J. Law (12 Vr.) 394, and *Willard v. Denise*, 50 N. J. Eq. (5 Dick.) 483. The latter of these cases which was also the later in point of time, laid down the rule that

"Where information is casually obtained by an agent of a corporation, the corporation is not charged with notice from the mere fact of its agent's knowledge, but if the corporation act through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal."

Under the rule thus stated the defendant corporation is clearly chargeable with notice of all the pertinent information possessed by Assmann and used by him in its behalf. We are not, however, willing to rest our decision of this matter upon the case of *Willard v. Denise*. In the earlier case of *State v. Sooy*, the rule stated in the syllabus of the opinion, delivered by Mr. Justice Dixon, is this:

"The knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent."

This rule, it will be observed, is far more favorable to the respondents in the present case than that of *Willard v. Denise*, and is, in our judgment, the rule to be applied whenever the presumption of imputed knowledge becomes pertinent to the rights or remedies of litigating parties. By force of this rule and of the reasoning upon which it rests, the American Can Company is chargeable with the knowledge possessed by Assmann only in case the principal, that is, the can company, if acting for itself in the acquisition of the complainant's process, or (being a corpo-

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ration) if acting through some other agent, would have received notice of the material matters known to Assmann. In applying this rule we think it is reasonably certain that if the board of directors of the American Can Company, when they contemplated going into competition with the complainant in the detinning business, by use of its process, has set about the acquisition of a practical knowledge of the construction and working details of such process, either as a board of directors or by the employment of agents not already possessed of such knowledge, they must inevitably have run up against the barrier of secrecy maintained by the complainant for the express purpose of heading off such competition. In that case they would either have failed to obtain the secret of the complainant's process except with its knowledge and consent, or if they did obtain it clandestinely from someone who held it in confidence, would have done so under circumstances that would have put them upon inquiry, and hence, have charged their corporation with whatever knowledge such inquiry would have led to. This is the test established by the case of *State v. Sooy* (as applied to a corporation) and the conclusion to which it leads is that the defendant corporation holds the fruits of Assmann's agency in its behalf, with the burden of so much of the knowledge possessed by him as would have come to it if it had acted for itself or through an agent who was not already possessed of such knowledge.

Being chargeable with this notice, the defendant corporation is amenable to the same decree touching competition and publication as that already accorded to the complainant with respect to Assmann individually. The inadequacy of the protection afforded to principals generally and to the defendant corporation in this case by the rule stated in *Willard v. Denise*, having been necessarily considered by us in reaching the conclusion that the doctrine of the case of *State v. Sooy* should by preference be adopted, the former case must be deemed to be overruled.

Any consideration of the defence set up under the assignment to the defendant corporation of the Goldschmidt process would clearly have been premature as long as the equitable rule applicable to the case was undetermined. This assignment was dated October 17th, 1904, that is to say, it was after the filing of the

opinion of Vice-Chancellor Reed overruling the defendant's demurrer and before the filing by the defendants of their supplemental answer. At the time the assignment was thus taken the defendants were fully apprised by the bill of complaint, if in no other way, of the precise nature of the complainant's claim to relief. The decision we have reached carries with it the defence that is thus sought to be set up under this assignment, upon the doctrine that if a trustee purchases a title that cures or completes one that he holds in trust the presumption in equity will be that the later purchase was made in aid of the former trust. *McCormick v. Ocean City Association*, 45 N. J. Eq. (18 Stew.) 561.

The complainant's counsel goes so far as to claim that under the rule thus stated the defendant corporation should be decreed to assign the Goldschmidt license to the complainant upon the payment by it of the \$10 paid to Goldschmidt for such grant. Whether such relief should be decreed in a suit to which the Goldschmidts are not parties need not be now decided. It is sufficient to hold in the present case that such assignment is of no avail to the defendants.

If further relief in this behalf becomes necessary application for that purpose may be made to the court of chancery.

The case against the defendants, Schmaal, Bauman and Egbert, as servants of the defendant corporation, follows the decision against that corporation as far as a continuance of its inequitable competition is concerned. In regard to future abstinence from both competition and publication, these defendants, as former employes of the complainant, are brought by the testimony within the rule laid down by this court in the case of *Stone v. Goss*, 65 N. J. Eq. (20 Dick.) 756.

Against all of the defendants therefore the relief prayed for in the complainant's bill should be decreed by the court of chancery with the single exception of the prayer for an accounting, which matter not having been argued before us may, with greater propriety, be disposed of in the court below upon the remission of this record.

To this end the decree of the court of chancery is reversed.

2 Buch.Siegman v. Electric Vehicle Co.

For affirmance—SWAYZE, BOGERT, VROOM, GREEN—4.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, REED, TRENCHARD, VREDENBURGH, GRAY, DILL—10.

RICHARD SIEGMAN, complainant-respondent,

v.

ELECTRIC VEHICLE COMPANY and RUDOLPH H. KISSEL, defendants-appellants.

[Argued November 26th, 1906. Decided March 4th, 1907.]

1. The prohibition of section 30 of the General Corporation act (*P. L. 1896 p. 286*) that "no corporation shall make dividends except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this act," is to be read in connection with the provisions of sections 27 and 29 respecting a decrease of capital stock, and deals with the payment of a dividend out of capital as amounting in effect to a reduction of capital stock.

2. While it is a function of the board of directors of a corporation to determine whether net earnings or surplus exist applicable to the payment of dividends, they cannot, by an erroneous determination of this point, confer either upon themselves or upon the corporation the power to make dividends out of capital.

3. The approval of a majority of the stockholders does not validate the declaration of dividends out of capital.

4. Neither the directors nor a majority of stockholders can waive the right of the company, under section 30 of the General Corporation act (*P. L. 1896 p. 286*), to recover from the directors the amount of dividends made out of capital.

5. The rule that courts will not ordinarily interfere with the internal management of corporations has no application to transactions that are *ultra vires* the company or prohibited by positive law.

On appeal from an order of the chancellor, advised by Vice-Chancellor Stevens, whose opinion is reported in 71 *N. J. Eq.* (1 Buch.) 123.

Siegman v. Electric Vehicle Co.72 Eq.

Mr. Richard V. Lindabury, for the appellants.

Mr. James E. Howell, for the respondent.

The opinion of the court was delivered by

PITNEY, J.

This is an appeal from an order overruling a plea interposed by the defendants to the complainant's bill of complaint.

The defendant corporation was formed under the General Corporation act of 1896. *P. L. 1896 p. 277*. Complainant, a stockholder therein, seeks in behalf of himself and of every other stockholder to require the defendant Kissel, who was formerly a director of the company, to pay to the company the amount of certain dividends that were unlawfully declared and paid out of the capital of the company, basing his action upon section 30 of the Corporation act as construed by this court in *Appleton v. American Malting Co.*, 65 N. J. Eq. (20 Dick.) 375.

The bill sets out that in the year 1899, while Mr. Kissel was a director, two dividends aggregating about \$325,000 were declared and paid, not out of the surplus or net profits arising from the business of the company, but out of its capital, and that Mr. Kissel voted to declare these dividends with knowledge that they were paid out of capital.

The plea, without denying this, sets up that in the year 1903, when the complainant made a demand upon the company and its directors and officers that they should take legal proceedings against the former directors (including Mr. Kissel) to recover the dividends in question, no member of the board of directors who were in office at the time of the declaration of the dividends was a member of the board; that the board of 1903 referred complainant's demand to a committee for investigation and report; that this committee made a thorough investigation, and thereupon reported that the claim of the complainant of illegality in the declaration of dividends was without substance; that in the judgment of the committee no action should be brought by the company or in its behalf to recover back the dividends; that in their opinion such an action could not be main-

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tained, and that if it could it would be unfair to the directors and detrimental to the best interests of the company. The plea further sets up that the directors examined this report and the documents showing the history and affairs of the company, and, being satisfied from such examination that the dividends complained of were reasonably made, in the light of what was known and believed at the time they were declared, that they were declared fairly and in good faith, and that it was not for the interest of the company that suit should be brought, thereupon resolved that complainant's demand be refused unless and until such suit should be ordered by a majority in interest of the stockholders other than the former directors, and that unless so ordered no suit should be brought by the company or on its behalf to recover said dividends. The plea further sets up that afterwards, on request of the complainant, the directors called a meeting of the stockholders and submitted to them the question whether or not suit should be brought; that at this stockholders' meeting the stock of the former directors was excluded from voting, and that of the stock actually voted one hundred and twenty-four thousand seven hundred and fifty-nine shares were against bringing suit, while only six hundred and fifty shares were voted in favor of it. That the directors and stockholders of the company, in thus refusing to bring suit to recover from the former directors (including Mr. Kissel) any of the dividends so declared, acted in good faith and according to their best judgment for the benefit of the company.

In the court of chancery the plea was overruled and an order made requiring the defendant to answer the bill.

Upon a consideration of the very learned and ingenious argument presented in this court in behalf of the appellant, it is obvious that its entire force depends upon the assumed basis that no question of *ultra vires* arises with respect either to the original act of declaring dividends or to the act of the present directors in refusing to sue. It is insisted that the declaration of dividends is within the power of business corporations; that while they are not to be declared, except out of earnings or surplus, it is for the board of directors to determine whether such earnings or surplus exist, and if in making such determination

they reach a wrong conclusion, either innocently or fraudulently, their act cannot be said to be *ultra vires*; and that the action of the present board in refusing to bring suit cannot be deemed *ultra vires*, because the bringing of actions to redress injuries to the corporation is a part of the internal management of corporations peculiarly within the province of the directors.

It would seem that a similar line of argument may have been presented to the learned vice-chancellor who heard the cause below, for in his opinion he deals with the right of the courts to interfere with the management of corporations in matters that are properly within the discretion of the directors, and where judicial interference is to be justified only on the ground that the discretion has not been fairly exercised. He holds that since upon the pleadings the right of recovery against Mr. Kissel is clear, some good reason should have been given for not suing him, and that the plea is bad for not giving such reason.

Without at all disputing the cogency of the vice-chancellor's reasoning, we prefer to base our affirmance upon grounds that are more fundamental. In our opinion the entire argument for the appellant rests upon a false basis. By the General Corporation act the powers of directors to declare dividends is limited to the distribution in this mode of the accumulated profits of the company. The matter is regulated by section 47, which, prior to the amendment of 1901 (*P. L. 1901 p. 246*), read as follows:

"47. The directors of every corporation created under this act shall, in January in each year, unless some specific day or days for that purpose be fixed in its charter or by-laws, and in that case then on the days so fixed, after reserving, over and above its capital stock paid in as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand; *provided*, that the corporation may in its certificate of incorporation, or in its by-laws, give the directors power to fix the amount to be reserved as a working capital."

Not only are the powers of the directors thus limited, but the corporation itself is disabled from making dividends from capital except on observing the formalities and procedure prescribed by

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the act with respect to the reduction of the capital stock. The prohibition is contained in the thirtieth section, which reads as follows: -

"30. No corporation shall make dividends, except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this act, and in case of any violation of the provisions of this section, the directors under whose administration the same may happen shall be jointly and severally liable, at any time within six years after paying such dividend, to the corporation and to its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced, with interest on the same from the time such liability accrued; *provided*, that any director who may have been absent when the same was done, or who may have dissented from the act or resolution by which the same was done, may exonerate himself from such liability by causing his dissent to be entered at large upon the minutes of the directors at the time the same was done, or forthwith after he shall have notice of the same, and by causing a true copy of said dissent to be published, within two weeks after the same shall have been so entered, in a newspaper in the county where the corporation has its principal office."

It will be observed that this section recognizes that the payment of a dividend out of capital amounts in effect to a reduction of capital stock. It deals with such a dividend as only one mode of reducing capital, and it prohibits any such reduction "except according to this act." The provisions referred to in this exception are those contained in sections 27 and 29, with respect to a decrease of capital stock, authorizing it to be done after the board of directors pass a resolution declaring it to be advisable and calling a meeting of the stockholders to take action thereon, the meeting to be held after notice to the stockholders, and if two-thirds in interest of each class of stockholders having voting powers shall vote in favor thereof, a certificate to that effect, duly authenticated, together with the written assent of two-thirds in interest of each class of stockholders, is to be filed in the office of the secretary of state, and the certificate is to be published for three weeks successively at least once in each week, in a newspaper published in the county in which the principal office of the corporation is located. Taking the three sections together, they are designed to make sure, *first*, that capital shall not be reduced by indirection nor without deliberate and

considered action taken for that avowed purpose, first by the directors and afterwards by two-thirds in interest of the stockholders, each stockholder having reasonable notice of the meeting and of the purpose for which it is called, and *secondly*, that formal written evidence of the action taken is to be lodged with the secretary of state and published in a newspaper, to the end that all the world may be apprised thereof.

✓ Under this statutory scheme it is manifest that while it is a function of the directors of a corporation to determine whether net earnings or surplus exist applicable to the payment of dividends, they cannot, by an erroneous determination of this point, confer either upon themselves or upon the corporation powers that by the Corporation act are withheld, nor make lawful that which the act has prohibited. If this were permissible, then by the same logic a court that is called upon to pass on the question of its jurisdiction over a given subject-matter might, by an erroneous determination, enlarge its jurisdiction.

Some matters that are *ultra vires* the directors may be *intra vires* the corporation; some matters that are *ultra vires* the corporation may be so, simply because they are unauthorized; other matters may be *ultra vires* the corporation because prohibited by law. The matter we are dealing with comes within the latter category. Not only it is not within the express or implied powers of a corporation to distribute its capital among the stockholders in the guise of dividends as from profits, but the doing of this is expressly and with emphasis prohibited. In *Appleton v. American Malling Co.*, *supra*, this court pointed out that the impairment of capital resulting from the unlawful payment of dividends not only renders the corporation less able to conduct its business and to meet its obligations, but tends to the injury of innocent investors by decreasing the actual while increasing the apparent value of the stock, and likewise to the injury of the very stockholders who innocently participate in the distribution, because they are led to treat dividends as income and expend them as such, while in truth they are unwittingly exhausting their principal.

The prohibition of section 30 of our Corporation act is ad-

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dressed not merely to the directors but to the company. It is the corporation that is in plain language disabled from making dividends except from surplus or net profits. And the personal liability to make restitution is imposed not merely upon those directors who vote to approve the unlawful dividend, but upon all the directors under whose administration the same may happen, unless they expressly dissent and cause their dissent to be entered upon the minutes and to be published in a newspaper of the county where the principal office of the corporation is located.

Manifestly nothing less than the unanimous voice of the stockholders can sanction the violation of a statutory prohibition, even when the prohibition is intended for the protection of the stockholders only. Where it is intended for the protection of the public as well, or is otherwise dictated by public policy, it is not easy to see how even the unanimous consent of the stockholders may give sanction. This question, however, is not now raised.

It needs no further argument to demonstrate, as we think, that the approval of the unlawful dividends by a majority of the stockholders as set forth in the plea before us does not validate the declaration of the dividends out of capital.

And for the same reason it follows that no conclusive efficacy can be accorded to the resolution of the stockholders approving the action of the present directors in declining to sue the former directors for restitution.

Conceding that with respect to matters that are by law confided to the judgment of the board of directors, their determination with respect to the commencement of an action may, under ordinary circumstances, be binding upon a dissenting stockholder; and that with respect to matters *ultra vires* the directors, but *intra vires* the corporation, the approval by a majority of the stockholders of the action of the directors may, in some cases, amount to a ratification; yet in our opinion, neither a board of directors nor a majority of stockholders can, by ratification, make valid that which the corporation itself is by law prohibited from doing; nor can such ratification be accomplished indirectly under the guise of a refusal to bring an action.

In *United States Steel Corporation v. Hodge*, 64 N. J. Eq.

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(19 Dick.) 807, 811, referring to a by-law of the corporation that provided for the submission of any contract of the directors to a meeting of the stockholders for their approval, Mr. Justice Van Syckel, speaking for this court, said: "This by-law cannot amplify the powers of the corporation or operate to validate any act *ultra vires* the corporation, but it enabled the stockholders, by a majority vote, to ratify any contract which the entire body of stockholders or the corporation might lawfully make."

Section 30 of the Corporation act not only prohibits dividends from capital, but prescribes a direct method by which the treasury of the company is to be made whole at the expense of the parties responsible. To say that any final discretion is reposed in the directors, or in the majority of stockholders, with respect to waiving such a cause of action, is to say in effect that the same body may, by indirection, confirm the dividends from capital which the law has distinctly prohibited.

It is unnecessary to review the numerous citations from textbooks and reported cases to which we are referred by the learned counsel for the appellants. *Cl. & M. Corp.* § 544; *Morawetz Corp.* §§ 244, 249; *Cook S. & S.* § 750; 4 *Thomp. Corp.* § 4487; *Lord v. Governor and Company of Copper Miners*, 2 Phil. 740, 751; *MacDougall v. Gardiner*, 1 Ch. Div. 13, 21, 25; *Burland v. Earle*, L. R. App. Cas. (1902) 83, 93; *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U. S. 450, 460; *Corbus v. Gold Mining Co.*, 187 U. S. 455; *Leslie v. Lorillard*, 110 N. Y. 519, 532, 535, 536; *Gamble v. Q. C. W. Co.*, 123 N. Y. 91, 99; *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495; *Ellerman v. Chicago Junction Railways Co.*, 49 N. J. Eq. (4 Dick.) 217, 232; *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. (7 Dick.) 620. The effect of these authorities is that courts will not, in ordinary circumstances, interfere with the internal management of corporations acting within their powers; but without exception the same authorities recognize, either expressly or by necessary implication, that this rule has no application to transactions that are *ultra vires* the company or prohibited by positive law.

The order under review should be affirmed, with costs.

2 Buch.Speer v. Erie Railroad Co.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

ABRAM SPEER, respondent,

v.

ERIE RAILROAD COMPANY, appellant.

[Argued November 28th, 1906. Decided March 4th, 1907.]

In a conveyance of land to a railroad company, the grantee agreed to make and maintain the necessary fences on both sides of the tract conveyed, and to provide the grantor with a suitable and convenient road crossing. At the time of the conveyance the land was farmland, and the road crossing connected the portions of the farm severed by the railroad. Fences were built with sliding bars at the road crossing, and both parties acquiesced in this arrangement for many years.—*Held*, that the crossing was a farm crossing only.

On appeal from a decree advised by Vice-Chancellor Stevens, whose opinion is reported in 70 N. J. Eq. (4 Robb.) 318.

Mr. Halsey M. Barrett, for the respondent.

Mr. Cortlandt Parker and *Mr. Richard Wayne Parker*, for the appellant.

The opinion of the court was delivered by

SWAYZE, J.

In accordance with the decree made pursuant to the opinion of this court in 68 N. J. Eq. (2 Robb.) 615, the complainant has elected to submit the question of damages to the court of chan-

cery, and the case has been heard in that aspect. The vice-chancellor found that the complainant had sustained damage by reason of the destruction of his crossing to the amount of \$3,000. The defendant complains of the amount of this award. The correctness of the vice-chancellor's judgment depends upon the character of the crossing to which the complainant was entitled. The vice-chancellor held that if it had been a mere farm or agricultural crossing \$500 would be adequate compensation for its destruction; that it was, however, a crossing which the complainant would have the right to use to connect two public streets which he might dedicate, one on either side of the railroad, thus affording access from the present public highway to the complainant's land, which might thus be developed for villa sites. The vice-chancellor recognized the difficulty in this method of development which was presented by the decision of this court in *Marino v. Central Railroad Co.*, 69 N. J. Law (40 Vr.) 628. In his view it was practicable for the complainant to escape the effect of that decision by giving to each purchaser of a lot a right of way along the whole course of the roads to be opened, or by dividing the land, over which the roads might be laid out on either side of the railway, into as many undivided shares as there were lots, and granting one of these shares with each lot, so that the grantee would own in fee-simple on both sides of the railway. The legality of such a method of development depends upon the extent of the complainant's right of crossing. This right was reserved in a grant by the complainant's ancestor at a time when the land was used only for farming purposes. The terms in which the right was reserved in the deed are as follows:

"The party of the second part [the railroad company] doth, for itself and its successors, agree to make and maintain the necessary fences on both sides of said tract of land, which shall be built before the work of grading on said tract is commenced, and shall provide the party of the first part with a suitable and convenient road crossing across the track of said railway where the party of the first part may direct."

In accordance with this reservation the railroad company built the fences and put sliding bars at the point where there had

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been an old wagon road, a crossing was constructed which seems to have been not more than twelve feet in width, and this was treated by the complainant and his predecessor in title as a compliance with the terms of the deed up to the time of the destruction of the crossing by the enforced elevation of the company's tracks.

It was well said by Sir George Jessel, in *Cannon v. Villars*, L. R. 8 Ch. Div. 415; 47 L. J. Ch. 597 (at p. 599): "As I understand it, the grant of a right of way, *per se*, and nothing else, may be a right of footway, or it may be a general right of way—that is, a right of way not only for people on foot, but for people on horseback, or people in carts, carriages and other vehicles. Which it is, is a question of construction of the grant, and that construction will, of course, depend on the circumstances surrounding the execution of the instrument so to say. Now, one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right of way is granted." Other cases are cited in *Jones Easem.* §§ 385, 389, and the principle has been recognized by this court in *Cooper v. Louanstein*, 37 N. J. Eq. (10 Stew.) 284 (at p. 301). We held, when the case was here before, that the crossing involved was a mere wagonway connecting portions of the complainant's land. It was not then necessary to decide as to the extent to which this wagonway might be used. Upon a consideration of that question, we think the facts of the case show that it was intended to reserve nothing more than a farm crossing as the vice-chancellor originally held, in 64 N. J. Eq. (19 Dick.) 601 (at p. 602). The use of the land at that time was for pasture, and there seems to have been no present likelihood of a development for villa sites, nor was there any such development for thirty years thereafter. Neither terminus of the crossing was in a public street. The width was but twelve feet—the width of a mere lane—not suggesting at all a street for public travel. The deed required the company to maintain fences, undoubtedly to prevent the landowner's cattle from straying upon the railroad tracks. To make this purpose effective, and to make the fences of any value to either party, it was necessary that they should be continuous, and this continuity was secured by providing

sliding bars. As late as 1900 the complainant regarded the land as pasture land, and desired the railroad company to repair the fence, as he wanted to turn his cattle into pasture, adding "as it is now it is not safe."

We do not think it necessary to decide the question suggested by the vice-chancellor as to the right of a landowner to maintain gates which obstruct a private way. That broad question is not now before us. The obstruction by bars was acquiesced in for years and was necessary to make effective the performance of the covenant to fence. The provision to this effect in the deed seems to have been originally intended for the benefit of the landowner. With changing circumstances it may have come to be more for the benefit of the railroad company. However that may be, the very fact that the parties agreed upon such an obstruction seems to us conclusive proof that they did not intend that this crossing should form a part of a public street, or rather a connecting link between two public streets. To use it in such a way would in effect enable the complainant to dedicate for a public street land of the railroad company over which he had a mere wagonway connecting two portions of his farm. We think, therefore, that if the complainant attempted to convey undivided rights in public streets opened by him on either side of the railroad, for the purpose of giving his grantees an undivided right in land on either side so that they might have access across the railroad by means of this wagonway, he would be evading the spirit of the grant made by his predecessor in title, and increasing materially the burden upon the railroad company. Such an evasion of the true intent of the deed would not be permissible.

The case differs from the English cases cited by the vice-chancellor—*Newcomen v. Coulson*, L. R. 5 Ch. Div. 133, 138; *United Land Co. v. Great Eastern Railroad Co.*, L. R. 10 Ch. App. 586; 44 L. J. Ch. 685. In the former case the right of way began at a common highway, and there was a provision that in case the allottees should "street" out the way, the same should remain eleven yards wide. These facts make a very different case from the present, where each terminus of the way was in a

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field, and the way itself was but twelve feet wide, enclosed by fences.

In *United Land Co. v. Great Eastern Railway Co.*, *supra*, Lord-Justice James, in the court of appeal, relied upon a special clause in the railway company's act, that the land should not be taken without the consent of the commissioners of the woods and forests, and that the railroad company should make and maintain such accommodation and communication as the commissioners should require. He said very properly that it was impossible to say that that clause in the act was restricted to such communication as were necessary to the then present state of the land. In the present case the agreement in the deed and the conduct of the parties was such as to negative any anticipated use of the crossing for a public way.

We think therefore that the vice-chancellor awarded damages upon an erroneous principle, and the decree must be reversed. It is difficult to determine exactly what compensation should be awarded for the destruction of this crossing considered as a farm crossing only. The witnesses vary considerably in their estimate. The vice-chancellor had the advantage of seeing them, and we think his estimate of \$500 for the destruction of the crossing, viewed as a farm crossing, is a proper award.

The decree should be reversed and the record remitted to the court of chancery in order that a decree may be entered for the sum of \$500.

For affirmance—HENDRICKSON, REED, TRENCHARD, BOGERT, VREDENBURGH, GRAY—6.

For reversal—THE CHIEF-JUSTICE, GARRISON, GARRETSON, SWAYZE, VROOM, GREEN, DILL—7.

Martin v. Atlas Estate Co.

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NOEL B. MARTIN, complainant-respondent,

v.

ATLAS ESTATE COMPANY, defendant-appellant.

[Submitted December 11th, 1906. Decided March 4th, 1907.]

1. Service of a subpoena *ad respondendum* upon a domestic corporation, defendant in a foreclosure suit, by delivering the same, at the registered office of the company in this state, to the vice-president, also a director—*Held* to be service upon the corporation.

2. The Chancery act (*P. L. 1902 p. 511 art. 2 § 5*) providing for the method of service of process for appearance upon the defendant does not mention corporations by name, but inasmuch as the name "person" in a statute includes corporations if they fall within the general reason and design of the act, this section of the Chancery act must be interpreted as warranting such service of process upon a corporation defendant as is equivalent to personal service upon an individual.

3. Service of a subpoena or process for appearance on any officer or agent of a corporation organized under the "Act concerning corporations (Revision of 1896)," whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in the case of a natural person.

4. Section 43a of the "Act concerning corporations (Revision of 1896)" (*P. L. 1898 p. 410*), requiring the public record of an agent "upon whom process against the corporation may be served," does not provide an exclusive method of acquiring jurisdiction over corporations in this state by the service of process for appearance upon an agent or officer, it creates an additional agent of the corporation upon whom process may—not must—be served.

On appeal from an order of the chancellor, advised by Vice-Chancellor Garrison.

Mr. Adolf L. Engelke, for the appellant.

Messrs. Howe & Davis, for the respondent.

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The opinion of the court was delivered by

DILL, J.

This is an appeal from an order of the chancellor refusing to set aside a service of process in a foreclosure suit against a corporation of this state organized under "An act concerning corporations (Revision of 1896)." The order appealed from discharged an order to show cause, made upon the defendant's petition, alleging that the court of chancery did not have jurisdiction, because the process of subpoena had not been served upon the registered statutory agent of the defendant corporation.

The subpoena was served by the sheriff, at the registered office of the corporation, upon Harry B. Brockhurst, vice-president and a director thereof. At that time, Adolf L. Engelke was the registered statutory agent of the defendant for the purpose of receiving process pursuant to the provisions of the "Act concerning corporations (Revision of 1896)." After the service of the subpoena, and before the time to answer had expired, the said Adolf L. Engelke, a counselor-at-law and solicitor in chancery, wrote the solicitors for the complainant that he represented the defendant company in this suit, requesting a copy of the bill of complaint and enclosed a stipulation extending the time for filing an answer, signed "Adolf L. Engelke, solicitor for the defendant."

The president of the defendant company likewise called at the office of the complainant's solicitors before the answer was due, had certain negotiations with them looking to an adjustment of the suit and also requested an extension of the time to answer.

No answer being filed, a decree *pro confesso* was taken, and subsequently a final decree requiring the mortgaged lands to be sold.

After final decree a petition was filed by the said Adolf L. Engelke, as solicitor for the defendant, to set aside the decree upon the ground that the service upon Brockhurst, the vice-president and director, was not service upon the defendant cor-

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poration, because Brockhurst was not the registered statutory agent of the company.

The sheriff, who had made a return that he had served a subpoena upon Brockhurst, agent of the company, filed a petition setting forth the method in which the process was served and asking leave to amend his return to the writ of subpoena by striking out the word "agent" after the name "Brockhurst" and inserting in its place the words "vice-president and director."

Leave was accordingly granted to amend the sheriff's return, but the defendant's application to vacate the process was refused.

From the foregoing statement of facts it appears that the defendant is in court by the service of a subpoena upon the vice-president and director, at the registered office of the company in this state.

Appellant's counsel contends that the court of chancery was without jurisdiction because such service was ineffectual. He insists that a writ of subpoena *ad respondendum* must be served "upon the stockholders or the directors or the trustees when convened as a body," citing *Laufman v. Hope Manufacturing Co.*, 54 N. J. Law (25 Vr.) 70 (at p. 72), or upon the registered statutory agent of the company, citing *P. L. 1898 p. 410*.

He argued that the Chancery act (*P. L. 1902 p. 511 art. 2 § 5*) deals only with natural persons and not with corporations; that the Practice act (*P. L. 1903 p. 537*) is limited to proceedings in courts of law and is not applicable to the court of chancery, and that consequently section 43a of the "Act concerning corporations" (*P. L. 1898 p. 410*), provides the only method by which the court of chancery can acquire jurisdiction over a domestic corporation by service in this state of a subpoena or process for appearance upon an officer or agent.

This position is untenable.

Without questioning that service "upon the stockholders or the directors or the trustees when convened as a body" would be service upon the corporation, nevertheless, jurisdiction may be acquired by service of a subpoena or process for appearance upon an officer or agent of a corporation defendant.

The Chancery act (*P. L. 1902 p. 511 art. 2 § 5*), providing

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for the method of service of process for appearance upon the defendant, does not mention corporations by name, but in the absence of statutory enactment the common law principle applies, that "the name 'person' in a statute includes corporations if they fall within the general reason and design of the act."

United States v. Amedy, 11 *Wheat.* 392.

Consequently, the section of the Chancery act under review must be interpreted as warranting such service of process upon a corporate defendant as is equivalent to personal service upon an individual.

From which it follows that in the case of a corporation of this state, under the "Act concerning corporations (Revision of 1896)," service of subpoena or process for appearance on any officer or agent of the company whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation is tantamount to personal service in the case of a natural person. This is in accord with the reasoning of Justice Dixon, in *Facts Publishing Co. v. Felton*, 52 *N. J. Law* (23 *Vr.*) 161, and of Justice Depue, in *Dock v. Elizabethtown Steam Manufacturing Co.*, 34 *N. J. Law* (5 *Vr.*) 312.

The service, as made in this case, was in accordance with the provisions of the Chancery act thus interpreted, and was therefore service upon the corporation.

The further contention of the appellant, that section 43a of the Corporation act (*P. L. 1898 p. 410*) which provides for the public record of an agent known as the registered agent, "upon whom process against the corporation may be served," precludes service of process upon any other officer or agent, is unsound.

The statute reads "upon whom process against the corporation may"—not must—"be served," and does no more in this respect than to create an additional agent of the corporation upon whom process may be served. *Nickolson v. Wheeling*, 110 *Fed. Rep.* 105.

Under the common law rule, also, the court of chancery acquired jurisdiction over the defendant.

This statute (*P. L. 1898 p. 410*) does not abridge the rule that

"the service of such process within the jurisdiction creating the defendant corporation, made on such head officer of the corporation as secured knowledge of the process to such corporation, is good service on the corporation." 1 *Tidd* (ed. of 1856) 121; 1 *Dan. Ch. Pr.* 445; *Ang. & A. Corp.* (11th ed.) 687; *Kansas City, &c., Railroad Co. v. Daughtry*, 138 U. S. 298.

But if the rules above stated were not to be applied, still the service should be upheld.

The subpoena was delivered to the vice president, a director, and at the registered office of the company in this state. Before the time to answer expired, knowledge of the process was acquired by the president, who endeavored to negotiate a compromise, and to that end sought an extension of time to answer.

The process also came into the hands of the registered statutory agent, the solicitor of the company, and it is unnecessary, under the circumstances of this case, to inquire by whose hands it was delivered to him.

Eventually, the process was delivered to the solicitor for the company, and he, as such solicitor, and in behalf of the corporation, signed a proposed stipulation, in writing, extending the defendant's time to answer thirty days.

This justifies the conclusion that the corporation, through its executive officers, had all requisite notice of the process and suit, and before the time to answer expired.

There are other grounds which would also lead to an affirmance, but it is unnecessary to discuss them, as the case may be disposed of upon the grounds urged by the appellant.

The order of the court of chancery is affirmed.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

2 Buch.Farrow v. Farrow.

ETHEL FARROW, respondent,

v.

WILLIAM FARROW, JR., appellant.

[Submitted November 20th, 1906. Decided March 4th, 1907.]

1. A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it, and of vesting title in the wife.

2. The common-law rule that "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life," has not been abrogated by our Married Woman's act (*Gen. Stat. p. 2012*), or by any other statutory provision.

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Grey.

Mr. Howard Carrow, for the appellant.

Mr. James M. E. Hildreth, and *Mr. Charles H. Edmunds* (of the Philadelphia bar), for the respondent.

The opinion of the court was delivered by

TRENCHARD, J.

This is an appeal from a decree of the court of chancery.

The bill was filed by Ethel Farrow, the respondent, against her husband, William Farrow, Jr., the appellant, who was living apart from her, for the recovery of the possession or the value of one solitaire diamond ring, one turquoise ring with sixteen small diamonds around it, and one pair of diamond earrings, that were in the possession of the wife at the time her husband separated from her, and which were then taken by him

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forcibly, and since have been converted to his own use. In the bill the complainant averred that these jewels had been given to her by her husband, the defendant, and that he had allowed her to apply them to her separate use.

The prayer of the bill is that the defendant

"may be ordered and decreed to deliver to your oratrix forthwith said personal property, or, in case he has sold or parted with the same, he may be ordered and decreed to pay to your oratrix such sum or sums as shall be a fair value of the same."

The answer of the defendant denies that the complainant was or is the owner of the said jewels; denies that he gave them to her, and that he allowed her to apply them to her separate use. It avers that the defendant

"bought and purchased the jewelry mentioned in the bill of complaint for the personal adornment of his wife, the complainant, but that he never gave said jewelry, or any part thereof, to his wife, and never parted with his title or possession to said jewelry, and that they are his property and in his possession."

At the hearing it appeared that the defendant had parted with the jewelry and the court of chancery decreed

"that the defendant do pay unto the complainant, by way of compensation for said solitaire diamond ring, turquoise ring with sixteen small diamonds around it, and pair of diamond ear-rings, the sum of \$670."

On this appeal we are not concerned with that part of the decree which awards compensation for the solitaire diamond ring, because it appeared at the hearing that it was given by the husband to the wife before their marriage as an engagement ring; the gift was absolute, and the property remains hers notwithstanding the subsequent marriage. This is admitted to be the legal situation by the defendant. To the extent that the decree directed payment for the value of the solitaire diamond ring, which was shown to be \$130, it was admittedly proper.

The controversy on this appeal is concerning the propriety of the decree so far as it relates to the turquoise ring and the diamond ear-rings, together valued at \$540.

2 Buch.Farrow v. Farrow.

The complainant, the wife, claims that this jewelry was given to her by her husband during coverture; that it was bought on the installment plan and that a considerable amount of the purchase-money still remained unpaid at the time when the husband took possession of it. This is stated to be the fact by the wife, who says the unpaid amount was somewhere about \$300. She then goes on to say:

"We paid so much a month; we undertook to pay \$40 per month; we didn't always pay that much; we paid what we thought we could; we thought it was money saved to buy the diamonds; that was the agreement between Will and me; that was the reason we bought them."

In the same connection she says:

"I don't remember any such conversation before Mr. Eldridge. No; we talked about these affairs between ourselves.

"Q. Between yourselves?

"A. Not before Mr. Eldridge.

"Q. Then after you were by yourselves?

"A. Yes, sir; at times we talked over buying diamonds to save money; we did; yes."

The testimony shows, beyond question, that the jewelry was purchased with the husband's money. It therefore was his property, unless it was bestowed by him upon his wife as a gift.

A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it and of vesting title in the wife. *Skillman v. Skillman*, 13 N. J. Eq. (2 Beas.) 403; *Dilts v. Stevenson*, 17 N. J. Eq. (2 C. E. Gr.) 407. See, also, 14 Am. & Eng. Encycl. L. (2d ed.) 1033, and cases there cited.

Applying these principles to the case under consideration, we find nothing to justify the claim of the wife that the jewelry was bestowed upon her by her husband as a gift. The evidence shows that it was purchased by the husband, not as a gift to his wife, but as an investment for their joint benefit, and also for the purpose of ornamenting the wife on suitable occasions; in other words, either it remained the absolute property of the hus-

band, or, at most, it became the wife's paraphernalia. In either event the husband was entitled to take possession of it and deal with it as he saw fit. Of course, this is true if it became his absolute property, and there remains only to be considered the legal situation if it became the wife's paraphernalia.

At common law the husband is bound to maintain the wife, and to provide her with suitable clothing appropriate to their degree, and his own circumstances and social position. That common-law obligation still rests upon the husband. As corollary to this obligation, the common law recognizes that articles of clothing and personal ornaments appropriate for the wife, which are purchased with the husband's money, or upon his credit, are his property, notwithstanding the fact that they are selected and purchased by the wife, or are intended for her personal and exclusive use. The wife's clothing and ornaments are called her paraphernalia, and the common-law rule that the ownership thereof during the life of the husband was in him, remains in force in all jurisdictions where that rule has not been abrogated by statute. It has not been abrogated in this state by the Married Woman's act (*Gen. Stat. p. 2012*), or by any other statutory provision. Except in cases where the wife herself purchases the paraphernalia with her own separate money or earnings, the rule remains exactly as it stood at common law. In Massachusetts it has been judicially declared that the common-law rule still prevails because of the absence of statutory provision changing it. *Hawkins v. Providence and Worcester Railroad Co.*, 119 Mass. 596. So, too, in Michigan the same rule prevails and for the same reason. *Smith v. Abair*, 87 Mich. 62.

If, therefore, the jewelry became the paraphernalia of the wife, then the common-law doctrine of paraphernalia applies, and that is this: That

"suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life." *Schoul. Dom. Rel.* (5th ed.) 208.

So much of the decree as adjudges that the defendant make compensation unto the complainant for the turquoise ring with

*2 Buch.*Rothchild's Case.

sixteen small diamonds around it and for the pair of diamond ear-rings, should be reversed. As the complainant was admittedly entitled to a decree for the value of the solitaire diamond ring, which was \$130, she is entitled to costs in the court below.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

In the matter of assessment of a collateral inheritance tax upon the estate of SIMON ROTHCHILD, deceased.

[Argued November 20th, 1906. Decided February 2d, 1907.]

On appeal from an order of the ordinary, whose opinion is reported in 71 *N. J. Eq.* (1 *Buch.*) 210.

Messrs. McDermott & Enright, for the appellant.

Mr. Edward D. Duffield, assistant attorney-general, for the respondent.

PER CURIAM.

The order appealed from in this case is affirmed, for the reasons stated in the opinion filed in the prerogative court by the ordinary.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

Hoopes v. Basic Company.

72 Eq.

HERMAN HOOPES et al., appellant,

v.

BASIC COMPANY, respondent.

[Argued November 21st, 1906. Decided February 22d, 1907.]

1. Where a proceeding is brought by a stockholder of a corporation to have it placed under disabilities because of insolvency, whether the plaintiff is a stockholder, and so entitled to sue, may be tested in a summary manner by plea in case the suit is commenced by bill, or by answer in case it is instituted by petition.

2. Where complainant transferred all his stock in defendant company to another corporation in exchange for the stock of the latter, and received back from it a single share, which he endorsed in blank and returned, such stock being transferred to him for the sole purpose of enabling him to qualify as a director in defendant company, he was not a stockholder thereof within *P. L. 1896 p. 298 ch. 185 § 65*, authorizing a stockholder of an insolvent company to sue to have the corporation placed under disabilities by injunction in respect to the exercise of its franchise and for the appointment of a receiver.

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Stevenson, who delivered the following opinion:

This is a bill filed under our Corporation act to have the defendant corporation, the Basic Company, declared insolvent and placed under disabilities in reference to the exercise of its franchises by an injunction and a receiver appointed. At the start the question was raised whether either of the complainants was qualified under our statute to bring this suit. One of the complainants alleges that he is a stockholder, holding one share of stock, of the par value of \$10; the total capital stock being \$1,000,000 par value. The other defendant, alleged to be a creditor, but practically counsel for the complainants, withdrew the claim that this co-complainant could be qualified as a creditor, and the question was presented whether Mr. Hoopes, the remaining complainant, is shown here to be a stockholder, so as to be

2 Buch.Hoopes v. Basic Company.

qualified to be the actor in this statutory suit against the corporation. The court suggested, and I think counsel acquiesced in the suggestion, that it would be proper to take the proofs first in regard to the status of Mr. Hoopes as a stockholder. Whether counsel acquiesced or not in that suggestion, it seems to me that in most cases it would be very wrong, indeed, to compel a corporation to submit all its financial affairs to the inspection of the court and the public, as long as it was uncertain whether the party complainant bringing the corporation into court had any status as a stockholder to carry on the suit. When the suit is commenced by bill, a proper mode of contesting the capacity of the complainant as a creditor or stockholder to bring the suit would be by plea. When the suit is commenced by petition, so that the technical rules of pleading which distinguish between demurrers, pleas and answers are to a large extent inapplicable, the answer to the petition in my opinion may well be strictly confined to the defence which we are considering in all cases where that defence is set up. But in all cases under our statute, whether on bill or petition, the trial is not hampered by forms or technical rules of procedure, but is "summary" in its nature, and very largely, at every stage, under the control of the court.

My conclusion is that the complainant is not qualified under our statute as a stockholder. The leading facts are these: At a time antedating the commencement of this suit by quite a period, the complainant, Mr. Hoopes, having a very considerable stock interest in this corporation, transferred all his holding of stock to the Union Dredging Company, and received in exchange about \$60,000 par value of the stock of the Union Dredging Company. He admits on the stand, with great frankness, that what he received was full compensation for his stock. At the time this transaction occurred the Union Dredging Company transferred back to him a single share of stock, of the par value of \$10, the share of stock by virtue of which he (Mr. Hoopes) now undertakes to sustain in this court his suit as a stockholder and invoke the statutory remedy against this corporation. There is no doubt, however, about what the purpose of this transfer was. There was no intention that Mr. Hoopes should be the beneficial owner of this share of stock. The transfer was made

in order that he might appear on the books of the company as a stockholder and thus apparently be qualified to act as a director. The intention was that he should become, and he did become, what is commonly called a "dummy" director. Immediately after the transfer of this stock (this single share of stock) to him and its proper transfer on the only stockbook they had, Mr. Hoopes immediately after, or within a year or two—not later than the summer of 1904, long before this suit was brought—endorsed the share in blank, and handed it back to the real owner, the Union Dredging Company. There is a discrepancy in the testimony as to the time when this was done. It is not material, even if we accept the complainant's testimony, because this transfer was made, as I said, not later than the summer of 1904. I strongly incline to the opinion that the transfer was made immediately after the share was made out to him. The share was made out to him for the purpose which I mentioned, he endorsed it and handed it back, and he did not have it in his possession afterwards; and, whichever date we take, in the summer of 1904, long before this suit was commenced, the Union Dredging Company, the actual owner of this share of stock, had the certificate in its possession, with the endorsement, in blank, of Mr. Hoopes, the party who appeared on the face of it as the holder of it. Of course Mr. Hoopes' name appears on the books of the company, if that expression can be applied to the mere stockbook; but Mr. Hoopes appeared on what books the company had as the holder of this one share of stock. Now, the question is, on which this whole controversy turns, whether Mr. Hoopes, holding this share of stock, nominally in this way, without any beneficial interest in it whatever—the sharp question, I say, in this case—is whether Mr. Hoopes, holding this single share of stock in this manner and for the purpose which I have indicated, is to be regarded as a stockholder within the meaning of that word as used in the sixty-fifth section of our Corporation act. *P. L. 1896 p. 298 ch. 185*. This section provides—and the language is the same that was employed when the law was first enacted as a part of the act to prevent fraud by incorporated companies in 1829—"whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds

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to carry on the same, any creditor or stockholder may, by petition or bill setting forth the facts, invoke the jurisdiction of the court of chancery, and, upon proof of the facts upon summary hearing, have a decree placing the corporation under disabilities by an injunction in respect to the exercise of its franchises and also, if necessary, the appointment of a receiver." Now, the question is, is this man a stockholder within the meaning of that act? There are no cases that I am acquainted with, either in New York or New Jersey, in which this question has been discussed. I gave counsel an opportunity to present cases and discuss the question, but their briefs do not contain anything that is helpful. They undoubtedly made careful examination and failed to find any authorities that would throw light on this subject. There is one case, and one only, that I know of, where the meaning of the word "creditor" in this clause of the act which I have read was the subject of investigation. There have been a number of cases where the meaning of the word "creditor" in the subsequent clauses, which defines the parties who may come in and prove claims and take a share of the assets, has been discussed; and the rule is well settled that the word "creditor" in that part of the act, that part which deals with the beneficiaries who are to take dividends, is to be construed very liberally. The last case in which this matter is discussed was the case of *Lehigh and Wilkes-Barre Coal Co. v. Stephens & Condit Transportation Co.* The report of the case will be found in 63 N. J. Eq. (18 Dick.) 107. I can state the leading facts sufficiently for present purposes from memory. In that case Vice-Chancellor Stevens holds that one having a claim for damages, unliquidated damages, against the corporation, based upon a tort of the corporation, may come into the insolvency proceedings and have his damages assessed, by a jury or otherwise, under the provisions of the act, and take a dividend ratably with the other creditors; and the reasoning upon which the vice-chancellor supports his conclusion seems to me to be unanswerable. He does not hold, nor has it ever been held, that such a person, holding a claim for unliquidated damages, is qualified as a creditor to be the actor in the suit; that does not follow. The case goes upon the idea that the assets are distributable to those

who have just claims of all kinds against the corporation, and as the residue is to be distributed to stockholders, it would be exceedingly unjust to leave claimants whose claims were based upon torts without relief against the assets while the stockholders were allowed to absorb them; and so, while such a claimant as I have mentioned is not a creditor, strictly speaking, at the time of the commencement of the insolvency proceedings, he is permitted to become a creditor by the establishment of his claim by a judgment, and thus he stands as a creditor before the proceedings are concluded and he takes his dividend. I give that case simply as an illustration to show the distinction between a creditor as defined in this act for the purpose of distribution, and a creditor as defined in the act for the purpose of allowing him to invoke the jurisdiction of the court as in this case. The case that I referred to a moment ago, which I think is the only case where the meaning of the word "creditor" under the first clause of section 65 is discussed, is *Fort Wayne Electric Corporation v. Franklin Electric Light Co.*, 57 N. J. Eq. (12 Dick.) 16. In that case Chancellor McGill holds, and the court of errors and appeals affirmed his decision for the reasons which he stated, that a creditor who had assigned his claim away, or had agreed to assign it away, but stood as the legal owner of the debt, having also a beneficial interest in the debt, because he had not been paid the price for the assignment—he had neither made the assignment, nor received the price—was qualified to maintain this suit. In the case of *Gallagher v. Asphalt Company of America*, 65 N. J. Eq. (20 Dick.) 258, I referred to this subject as follows: "The meaning of the word 'creditor,' as used in our statute in defining the classes of persons who are authorized to maintain this statutory proceeding, has been discussed in several cases (which are here stated). It is settled that the word 'creditor' is not used in our statute in a narrow, technical sense. It is used in a broad sense, and I think it is safe to say that the general intention is that if a party is so related to the corporation and its assets as to be entitled to a share of what is divided among creditors—if the party can come into the proceedings as a claimant and prove his claim, so as to be entitled to a dividend—it must be generally true that he is qualified as a

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creditor to institute the proceedings which result in the distribution of the assets in part to himself. But in this case it is not necessary to lay down so broad a rule as that in order to find that the complainants are qualified as creditors." In that case I indicated a general opinion that as a general rule if the party posing as a creditor, claiming the right to institute this statutory action, stood in such relation to the assets that he had a right to a share or a dividend, then he was properly qualified as a creditor to institute the action. Such further reflection as I have given to the subject has not disturbed that impression. I think, however, especially in view of this decision of Vice-Chancellor Stevens, one modification is necessary. The party who claims to be a creditor, so as to be entitled to institute this action, must, I think, at the time he comes into court with his bill, be a creditor, as distinguished from being merely entitled to become a creditor by the proof of a claim for damages. If the party complainant, asserting that he is a creditor by proving before the receiver precisely what he proves before the court in order to qualify himself to bring the suit, is entitled to a dividend, then I think he passes the test. Of course, a man who has a claim for damages for a tort cannot meet that test. He cannot come into court with a bill against the corporation and say, "I am a creditor;" but he can say, "I can make myself a creditor, if somebody else will only start these proceedings, by bringing forward my claim and having it proved, having a trial by jury."

Now, then, when you pass from the case of the creditor to the case of a stockholder, I know of no other test. If the party asserting that he is a stockholder has no interest as a stockholder in the assets, then it seems to me he cannot maintain this suit. He is not a stockholder within the meaning of this first clause of section 65. I stated to counsel, in postponing this case the other day, some of the leading principles which, I think, control, and which relate to the fundamental nature of this statutory action. I had occasion to discuss these principles at considerable length in the case of *Gallagher v. Asphalt Company of America*, 65 N. J. Eq. (20 Dick.) 258; 55 Atl. Rep. 259, in the same case in a subsequent opinion, reported in 58 Atl. Rep. 403, and more

recently in the case of *Pierce v. Old Dominion Copper Mining and Smelting Co.*, 58 Atl. Rep. §19. It was because of the views which I expressed in these cases in regard to the nature of our statutory action that I laid this point over for further argument and further consideration. We have here not a private action *inter partes*. The complainant, whether he is a stockholder or a creditor, acts as the representative of the public, and particularly of the whole body of stockholders and creditors of the corporation. It is a great mistake to suppose that this is a collection suit or a creditors' suit. The complainant, if he is a creditor, by his decree, whether he is a creditor or stockholder—by his decree against the corporation, resulting in its being wound up and its assets being distributed—gets nothing necessarily advantageous to himself. He is obliged afterwards to come humbly before the receiver and prove his claim, and it may be rejected, and he may never have any share awarded to him in the assets, and that fact, as I have pointed out in this case, very strongly indicates that Chancellor Williamson and Chancellor Vroom were entirely right in saying that this is an action in which, not the particular grievance of the complainant is redressed, but the grievance of the public, including the whole body of stockholders and creditors. Now, with that sort of an action, in which the actor appears as the representative of other interests, in which the actor is not prosecuting for a decree which entitled him necessarily to anything himself, the question was raised in my mind what the legislature meant originally, and what it means now, in saying that a stockholder, any stockholder, may file this bill in which the rights of the public are so directly concerned, in which the rights of all the stockholders and all the creditors are concerned, and in which finally the actor, this representative, the complainant, may take nothing at all. The result of my reflection upon the subject in the absence of any authorities, is that the legislature means to commit the institution of this suit to the parties who are interested as creditors or as stockholders. The legislature relies upon the selfish interest of the creditor or of the stockholder to have suit brought when public interests require it. That is a very common principle that runs all through our jurisprudence, and is an ancient principle. All *qui tam* actions are based upon it. The original New York statute

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of 1825, upon which our act of 1829—the act to prevent fraud by incorporated companies—was modeled, made it the duty of the attorney-general to bring the suit. A creditor, also, was permitted to bring the suit, but not a stockholder. A little later the stockholder was enabled to appear as the actor. Our New Jersey statute from the start allowed the suit to be brought by either a stockholder or a creditor, while it conferred no power and imposed no duty upon the attorney-general of the state in relation thereto. The legislative theory appears to have been that the public interests, and the interests of stockholders and directors of corporations particularly, would be best cared for if reliance was had upon the selfish interest of some stockholder or some creditor to come forward when the corporation becomes insolvent and its operations become inimical to public interests. Now, applying the test, does Mr. Hoopes appear as an outsider? He holds this piece of paper. No; he does not even hold the piece of paper which represents \$10, one share of stock of this corporation. He was not even trusted to retain that certificate. It was issued to him, he endorsed it, and turned it back to the Union Dredging Company, and the dredging company owns it to-day; and if this suit should proceed, and there should be a dividend payable to stockholders, Mr. Hoopes would not get any dividend on that share of stock. It would go to the dredging company. In my judgment no corporation of the state should be bound to meet the attack of one who comes into court with a share of stock which he admits he does not own, which belongs to somebody else.

The views which I have endeavored to indicate lead to the result that the bill of complaint should be dismissed.

Mr. George Whitefield Betts, for the appellant.

Mr. Thomas B. Harned, for the respondent.

PER CURIAM.

The decree in this case is affirmed, for the reasons stated in the opinion filed in the court of chancery by Vice-Chancellor Stevenson.

Duke v. Duke.

72 Eq.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

JAMES B. DUKE, respondent,

v.

LILLIAN N. DUKE, appellant.

[Argued November 22d, 1906. Decided November 26th, 1906.]

On appeal from an order of the chancellor, advised by Vice-Chancellor Pitney, whose opinion is reported in 70 N. J. Eq. (4 Robb.) 135.

Mr. Chauncey G. Parker, for the appellant.

Messrs. Lindabury, Depue & Faulks, for the respondent.

PER CURIAM.

The order appealed from in this case is affirmed, for the reasons stated in the opinion filed in the court of chancery by Vice-Chancellor Pitney.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

2 Buch.Siegman v. Electric Vehicle Co.

RICHARD SIEGMAN, complainant-respondent,

v.

ELECTRIC VEHICLE COMPANY et al., defendants-appellants.

[Argued November 26th, 1906. Decided March 26th, 1907.]

On appeal from an order of the chancellor, advised by Vice-Chancellor Stevens.

Mr. Richard V. Lindabury, for the appellants.

Mr. James E. Howell, for the respondent.

PER CURIAM.

This cause was argued together with *Siegman v. Electric Vehicle Co. and Kissell*, decided by this court at the present term, upon an opinion delivered by Mr. Justice Pitney, *ante p. 403*. The same question being presented in each of the two cases, the order under review herein will be affirmed, with costs, for the reasons given in that opinion.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

Pryor v. Gray.

72 Eq.

ROBERT W. PRYOR, receiver, appellee,

v.

ALLEN S. GRAY, appellant.

[Submitted December 10th, 1906. Decided March 4th, 1907.]

On appeal from an order of the court of chancery, advised by Vice-Chancellor Grey, whose opinion is reported in 70 *N. J. Eq.* (4 *Robb.*) 413.

Mr. Malcolm MacLear, for the appellant.

Mr. Frank Benjamin, for the appellee.

PER CURIAM.

The order appealed from, which is an order overruling a demurrer to an amended bill of complaint, will be affirmed for the reasons set forth in the opinion filed in the court of chancery by Vice-Chancellor Grey in so far as that opinion discusses the merits. Two grounds of demurrer, viz., the fourth and fifth, were not considered by the vice-chancellor for the reason that they could have been assigned under a previous demurrer that had been filed to the original bill, and this circumstance was held by the learned vice-chancellor to be a waiver of any right of objection to the amended bill upon these same grounds.

Without passing upon the correctness of the vice-chancellor's conclusion upon this point of practice we have considered the grounds of demurrer referred to upon their merits.

The fourth ground of demurrer is, that the amended bill of complaint does not show that there are any moneys due by the insolvent company to persons other than the defendant, or that persons other than the defendant are interested, in the estate of the insolvent company.

The fifth ground of demurrer is, that the amended bill of

2 Buch.**Brown v. Citizens Ice and Cold Storage Co.**

complaint does not show that there are not sufficient moneys to pay all the debts of the insolvent company.

We have examined the amended bill of complaint in the light of these criticisms, and our conclusion is that the matters referred to are shown by such bill with sufficient certainty for all purposes involved in the pending litigation, and hence that the demurrant suffered no injury by the action of the court below that entitles him to a reversal of its order.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

JAMES BROWN, respondent,

v.

CITIZENS ICE AND COLD STORAGE COMPANY et al., appellants.

[Submitted December 11th, 1906. Decided February 2d, 1907.]

A corporation, empowered by its charter to do any act in connection with its business, and to issue bonds secured by mortgage, and to sell the same to raise money with which to erect machinery, &c., has authority to borrow money and execute a mortgage to secure the same, the clause having reference to the issuing of bonds not preventing the corporation from borrowing money and securing it by mortgage.

On appeal of the Pennsylvania Iron Works Company from a decree in the court of chancery, advised by Vice-Chancellor Bergen, who filed the following opinion:

The defendant company gave two mortgages, one for \$10,000 to the complainant, another for \$7,235 to Annie Lisle Balling-

Brown v. Citizens Ice and Cold Storage Co.72 Eq.

all, which she assigned to the complainant. There is no dispute about the amount of the loans, nor that they represent debts due by the company, but the defendant insists that under the terms of defendant's charter, as expressed in the following words: "And the doing of any other act or acts, thing or things, incidentally to grow out of, or connected with said business or any part or parts thereof; to issue bonds secured by mortgage or mortgages upon the property and franchises of said corporation, and to sell the same for the purpose of raising money, with which to erect machinery and otherwise to improve said lands." The corporation had no authority to mortgage its property, other than for the purposes above stated, and as the money, to secure which the two mortgages were given, was not applied to the payment of debts due for "machinery and otherwise to improve said lands," the mortgages are *ultra vires*, and cannot stand as encumbrances on the land. In my opinion, the general power given a corporation, under our act to mortgage its property, is not restricted by the terms of the charter invoked. That clause has reference alone to the issuing of bonds in the usual commercial form, of a negotiable character, to be sold and passed by delivery, and was not intended to, and does not, prevent the corporation from securing to a creditor its debt by way of mortgage in common form; and the power to do so is fully conferred by the clause in the charter which authorizes the company "to do any act or thing incidentally to grow out of or in connection with said business," implying the right to borrow money and pledge its property as security.

The complainant is entitled to a decree.

Mr. Norman Grey, for the appellant.

Mr. E. Ambler Armstrong, for the respondent.

PER CURIAM.

The decree appealed from in this case is affirmed, for the reasons stated in the opinion filed in the court of chancery by Vice-Chancellor Bergen.

2 Buch.Lipp v. Fielder.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

CLARA K. LIPP, executrix, &c., appellant,

v.

BENJAMIN H. FIELDER, et al., respondents.

[Submitted December 11th, 1906. Decided February 2d, 1907.]

1. Where a plaintiff sued in his lifetime to compel specific performance of an alleged verbal promise by his wife that on the death of either certain land which complainant had purchased in her name should become the land of the survivor, the wife's executor being a necessary party in his representative capacity, both because he had a power of sale under the wife's will and because he might need the proceeds of a sale of the property to pay debts, the husband was not a competent witness, under *P. L. 1900 p. 362*, excluding a party as a witness, where the opposite party is sued in a representative capacity.

2. Complainant purchased certain land with his own money, but caused it to be conveyed to his wife to prevent his children by a former marriage from obtaining the same at his death. On the death of the wife he sued to establish a trust in the same, and that if one died the other would get the property.—*Held*, that the evidence was insufficient to rebut the presumption that the wife took the property by irrevocable gift.

3. Evidence *held* insufficient to establish a contract by which a wife agreed to make an irrevocable will in her husband's favor.

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Stevens, who filed the following opinion:

This is a suit which was begun by William C. Lipp in his lifetime for the purpose of compelling the specific performance of an alleged verbal promise made to him by his deceased wife, that at the death of either of them certain land which he had pur-

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chased in her name should become the land of the survivor. He has since died, but not before he gave his testimony in reference to the alleged agreement. The defendants to the bill are Benjamin H. Fielder, Jr., executor of the wife, and the Lakewood Library Association, her devisee.

I think that, without the testimony of the deceased complainant, the allegations of the bill, either in its original or amended form, are not satisfactorily proved. The first question is, therefore, whether the complainant is a competent witness under that provision of the Evidence act which excludes a party from being sworn as a witness where the opposite party is sued in a representative capacity. The complainant testified shortly before the new Evidence act took effect (*P. L. 1900 p. 362*), but that does not make any difference in this case. Under *Kempton v. Bartine*, 59 *N. J. Eq.* (14 *Dick.*) 149; 60 *N. J. Eq.* (15 *Dick.*) 411, and *Wyckoff v. Norton*, 60 *N. J. Eq.* (15 *Dick.*) 478, the executor is a necessary party. In any view, he is a proper party. He has, in fact, been made a party in his representative capacity, both because he has a power of sale under the will, and because, as is said by Vice-Chancellor Grey in the case above cited, he may, as executor, need the proceeds of sale to pay the testatrix's debts. Inasmuch as the executor and devisee are really, as well as formally, on the same side, are equally interested in resisting the complainant's claim, and will both be injuriously affected by the establishment of that claim, it seems to me that *Hodge v. Coriell*, 44 *N. J. Law* (15 *Vr.*) 456; 46 *N. J. Law* (17 *Vr.*) 354, applies. The record is conclusive and prevents the complainant from testifying against either defendant, because that record shows that on the defendant side there is a party being sued in a representative capacity. This renders it unnecessary for me to consider whether a devisee is a party sued in a representative capacity where the suit is based upon the contract of the ancestor, which, it is alleged, binds the devisee or affects the lands devised to him, a point upon which there is a conflict of authority.

Without this testimony I think that the *Duval Case*, 54 *N. J. Eq.* (9 *Dick.*) 581; 55 *N. J. Eq.* (11 *Dick.*) 376, is not applicable.

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The complainant, Lipp, was a farmer. On April 14th, 1869, the Bricksburg Land Company, for the consideration of \$1,080, agreed to convey to him a tract of land near Lakewood, containing thirty-six acres. In February, 1871, the company, instead of conveying it to him, conveyed it to his wife Joanna. They had been married in May, 1866, and on August 23d, 1868, Joanna had executed a will by which she gave all the property then possessed by her, or of which she might thereafter become possessed, to her husband. The evidence indicates that her husband had made a similar disposition in her favor at the same time. In point of fact, neither of them, at that time, possessed property of any considerable value, except a mortgage which the wife held, and from which she appears to have realized \$500.

The complainant's insistent is that at the time of the conveyance of the tract in controversy to his wife, it was verbally agreed between them that the property should be his if he survived her. Outside of his own evidence, which must be disregarded, the witness chiefly relied upon is Abraham Daily, a Brooklyn lawyer. He says that in a conversation, had between himself and Mr. and Mrs. Lipp at the dinner table, sixteen or seventeen years before he testified,

"it was stated that Mr. Lipp had purchased that property, taking the title in the name of his wife, so that if anything should happen to him certain relatives whom he had in California would not come on and disturb her; that an agreement had been made between them that she, on her decease, was to leave a will giving the property to him, so that he would have a home if he outlived her."

He says, further, that the question came up whether under Mrs. Lipp's will, as then made, the property subsequently acquired would pass, and he said "that there would be no necessity for drawing an additional will as long as that will was made to cover any subsequent purchased property." He says distinctly, on cross-examination, that the agreement referred to preceded, as he understood, the making of the wills. These wills, as I have said, were made nearly three years before the deed was actually delivered.

The statement was the complainant's statement to him, and not his wife's although made in her presence. It was not made

in a professional interview, but casually, at the dinner table, sixteen or seventeen years before the witness testified. Assuming, however, it to be a perfectly correct version of what was said, and assuming, moreover, that because not contradicted by the wife at the time she must be deemed to have admitted its truth, it neither shows a binding promise to dispose of the land by will, nor does it show a resulting trust.

It is said in *Duval v. Duval*, *supra*, that when lands are purchased by one person who pays the purchase price, and they are conveyed to another person who is a stranger, a trust in the land is implied and results in favor of him who has paid the consideration. But that where a husband purchases and pays for lands and takes the title in the name of his wife, a presumption arises that the husband has caused the conveyance to be made by way of settlement upon her, and that this presumption will only be overcome by clear proof to the contrary.

As I have said, Mr. Daily testifies that he understood that the agreement preceded the making of the wills. Now, as Vice-Chancellor Reed said in *Duval v. Duval*, 54 N. J. Eq. (9 Dick.) 588, a verbal agreement to exchange wills would not, so far as land was concerned, be binding, because of the provisions of the statute of frauds. The making of the wills themselves would not be part performance. Either party could revoke at pleasure, unless restrained by binding contract, and such contract, if it had reference to land, must have been in writing. Up to the time of the conveyance, therefore, neither party was bound. Then came the conveyance. Now, this conveyance, standing by itself, even assuming as the evidence indicates that it was paid for by the husband's money, would, under the operation of the rule above stated, import a gift to or settlement upon the wife. This being its import, how, in the absence of any agreement then made, could it be regarded as proof that the wife thereupon became bound by contract to devise the land to her husband; that her will, up to that time revocable, now, because her husband made her a gift, became irrevocable. Such an insistent seems to me to be little short of absurd.

But how does the matter stand upon the notion of a resulting trust? The presumption is, in the case of a wife, against a

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resulting trust. It must be shown, clearly and satisfactorily, that a resulting trust was intended. Here we have no proof of any agreement relating to the matter, or even of any admission of facts from which such agreement could be inferred. A verbal agreement relating to a will that she had made, three years before, having no reference to that particular land, is certainly not proof of such agreement. The transactions have no inherent relation to each other; they are severed in point of time, and they are not connected by evidence. There is no express proof that it was agreed that Mrs. Lipp was to hold the land as trustee, and it cannot be reasonably inferred that she then irrevocably bound herself to do so, because three years before she had made a revocable will. Mrs. Lipp's title was evidenced by a regular deed, made at her husband's instance and duly recorded. It declared, in terms, that she was to hold for her *own* use. Public policy requires that such a conveyance should have its proper effect, unless there is convincing proof to the contrary.

The other evidence produced by complainant amounts to little more than the admission by the wife of that which was the undoubted fact, viz., that she had made a will in her husband's favor and that under this will he would take at her death. Several of complainant's witnesses testify that the reason both Mr. and Mrs. Lipp gave for putting the title in her name was that his children by his first wife would be thereby prevented from getting the property. That he did not wish to provide for them appears from the fact that in January, 1899, he, by his last will, left all his property to his niece, the present complainant. The result of the evidence, outside of the husband's, seems to be this: That he wanted to secure his wife in the possession of the property in his lifetime by a decisive act which his children, by his first wife, could not nullify, and that having, at that time, entire confidence in her, he was willing to trust her sense of right to leave him the property by will if she died first. It was not until twenty years afterwards that they quarreled.

Mrs. Daily testifies that Mrs. Lipp told her that Mr. Lipp had bought the property with his money and put it in her name so that she would be protected, but that she had made a will and

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left it all to him. Mr. Marston says he heard them say that if one died the other would get the property. Clara Lipp, the present complainant, Mr. Lipp's devisee, goes further. She says that on one occasion Mrs. Lipp said that her husband had put the deed in her name so that if anything should happen his children would not cause trouble: "that they had an agreement that whoever should die first the other should take the property." In her conversation with this witness it would appear that Mrs. Lipp admitted an agreement—but what agreement? If the reference is to the agreement to make mutual wills, it is disposed of by what has already been said. If to some other agreement, when and where and under what circumstances was it made? Was it supported by a consideration? Was it in writing or was it merely verbal? Without information on these important points it is impossible to say whether or not an obligation arose or a trust resulted. This witness, whose interest in the result is apparent, does not give us any information about them. A statement so indefinite can hardly avail to overcome the evidence of the deed, and be deemed satisfactory proof of the allegations of the bill.

Mr. R. Ten Broeck Stout, for the appellant.

Mr. Aaron E. Johnsten, for the respondent.

PER CURIAM.

The decree in this case is affirmed, for the reasons stated in the opinion filed in the court of chancery by Vice-Chancellor Stevens.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—VROOM—1.

2 Buch.Feinberg v. Feinberg.

HAZER FEINBERG, respondent,

v.

ANNIE FEINBERG, appellant.

[Submitted December 11th, 1906. Decided February 2d, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Grey, whose opinion is reported in *59 Atl. Rep.* 880.

Mr. John W. Wescott, for the appellant.

Mr. Andrew J. King, for the respondent.

PER CURIAM.

The decree in this case is affirmed, for the reasons stated in the opinion filed in the court of chancery by Vice-Chancellor Grey.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1907.

WILLIAM J. MAGIE, CHANCELIOR.

HENRY C. PITNEY, JOHN R. EMERY, FREDERIC W.
STEVENS, EDMUND B. LEAMING, EUGENE STEVENSON,
JAMES J. BERGEN AND LINDLEY M.
GARRISON, VICE-CHANCELLORS.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK
et al.

v.

THE ERIE RAILROAD COMPANY et al.

[Submitted December —, 1906. Decided April 4th, 1907.]

1. A bill was filed by a city setting forth its control of public streets therein, and that a railway company, by its charter, constructed a railroad across a street of said city; that the franchises and rights of that

company are now vested in one of the defendants, and that the other defendant has leased the said property and franchises, and charging that the defendants are obligated to perform the duties imposed on the railroad company which constructed the road; that across said street the defendants now have laid six tracks; that by the increase of population the street in question is used by a great number of people, and that crossing it at grade with those six tracks forms a serious impediment and obstruction to travel on the street; that by the ninth section of the charter of the railway company which constructed the said crossing that company was required to construct and keep in repair good and sufficient passages over or under said railway where any public or other road should cross the same, so that the passage of carriages, horses and cattle across the railway should not be impeded, and praying that this court should, by injunction, compel the defendants to effect the crossing of the tracks across said street in some other manner than at the grade of the street.—*Held*, (1) that upon these statements the jurisdiction of this court to make the decree prayed for is conferred by section 29 of the revised act concerning railroads, approved April 14th, 1903; (2) that the conferring of such jurisdiction upon this court was within the power of the legislature.

2. The duty imposed upon the railway company which laid the tracks in question was not a duty completely performed by an original construction in conformity therewith, but it was a continuing duty, varying according to the changed circumstances, and requiring a crossing to be sufficient to permit the passage across the railway without impediment.

3. Such a bill is not objectionable because it fails to assert that the crossing of said street in a manner other than at grade is practicable, or because it does not specify what crossing the city seeks to have decreed. If the jurisdiction of the court is made to appear by the statements of the bill, the practicability of a safe crossing and the determination of what crossing should be made is for the court to determine.

4. Such a bill is not objectionable because it fails to state that notice of the intention to file such bill was given to the defendants. The notice prescribed by section 29 of the revised Railroad act relates only to the proceeding to construct such crossings by the municipality if the railroad to which notice is given does not, within a reasonable time, itself construct them. The notice fixes the commencement of the time, and has no relation to the application to this court to fix and determine how the crossing should be constructed under the law governing the railroad company.

5. The statements of the bill present a case for the jurisdiction of this court over the joint use, by the public and by a railroad company, of the same land. Where two public users are in conflict, this court may determine how the users may be continued so as to be safe and convenient.

On demurrer to bill.

Mr. Joseph Coult, for the complainants.

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Mr. Cortlandt Parker, Mr. Charles L. Corbin and Mr. Cortlandt Parker, Jr., for the defendants.

MAGIE, CHANCELLOR.

The bill demurred to sets forth the power of the city of Newark and its board of street and water commissioners to control and regulate public streets and highways in that city, and among others, a street called Summer avenue.

The bill then proceeds to state the incorporation of the Montclair Railway Company, by an act of the legislature, approved March 18th, 1867, which company, under the authority thereby conferred, laid and constructed a railroad from Montclair, in Essex county, to the Hudson river, in Hudson county, and that subsequently, by various foreclosures, the property and franchises of the Montclair Railway Company became vested in the New York and Greenwood Lake Railroad Company, one of the defendants, which latter company thereby became obligated to perform the duties imposed on the Montclair Railway Company by the act above cited, and that afterward, the Erie Railroad Company, a corporation of the State of New York, the other defendant, leased the property and franchises of the New York and Greenwood Lake company, and thereby acquired the rights and privileges given to the Montclair Railway Company by said act, and so it also became obligated to perform all the duties imposed upon the Montclair Railway Company by said act.

The bill further states that two main tracks now operated by the Erie Railroad Company on the division called the Greenwood Lake Division, which are owned by the New York and Greenwood Lake company, and were originally constructed by the Montclair Railway Company, cross the street known as Summer avenue, at grade, and that the Erie Railroad Company has laid, and is now using, additional tracks, to the total number of six tracks, at the crossing of Summer avenue.

The bill further states that, by the development of the northern part of the city of Newark, the public street known as Summer avenue has greatly increased in use and importance, and is now used by a great number of people at that crossing.

The bill recites the ninth section of the act incorporating the

Montclair Railway Company, which requires the company to construct and keep in repair, good and sufficient bridges over and under the said railway, where any public or other road should cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby.

The bill further states that the crossing of Summer avenue, at grade, with six sets of railroad tracks forms a serious impediment and obstruction to travel upon the said street, and that defendants have not constructed, and do not keep in repair, good and sufficient bridges over or under the said railroad at Summer avenue, and have not performed the duties imposed upon them in this regard; that the crossing over the tracks at Summer avenue, as now laid, is difficult and dangerous, because of the frequent passage of passenger and freight trains across said street at a high rate of speed, and that persons attempting to cross the tracks are frequently detained at this crossing for a long space of time; that crossing this street is attended with great inconvenience and great danger, and that a different method of crossing, which will be safe for the public using the street, is imperatively demanded.

The bill further refers to section 29 of the "Act concerning railroads" (Revision of 1903), approved April 14th, 1903 (*P. L. 1903 p. 645*), and although it omits a portion of the said section, it states the provision contained in that section which prescribes that, when any railroad shall not properly construct and maintain the bridges or other crossings of highways by its railroad tracks, as required by law, it shall be lawful for the governing body of the municipality wherein such crossings are located, by a suit in equity, to compel the specific performance of the duties imposed by law upon such company with respect to the construction, maintenance and repair of such bridges and crossings.

The bill proceeds to charge that it is the duty of the defendants to have the crossing at Summer avenue made so as not to impede public travel and the public use of the said street, and that defendants should have made some other crossing by depressing or elevating the tracks of their railroad, or by making necessary changes in the grade of the street.

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The bill further charges that, where the right of the public to use a public highway, and the right of a railroad company to operate its railroad across that highway, are in conflict, as in the case of this crossing, this court has power to regulate the manner of crossing so as to protect the rights of both parties and insure the safety of the public.

Upon these statements the prayer of the bill is that defendants be required, by mandatory injunction under the direction of this court, to effect the crossing of the present tracks over Summer avenue in some other manner than at the grade of the street, and for this purpose to construct and keep in repair good and sufficient bridges or passages over or under said railroad tracks, as at present constructed across Summer avenue, so that the passage of carriages, horses and cattle upon said street or highway shall not be impeded thereby. There is also a prayer for further relief.

To this bill the defendants filed joint and several demurrers, and for causes of demurrer they show various objections, which, I think, may be summarized under five heads:

First. That upon the statements of the bill the defendants must be presumed to have made a suitable crossing, under the requirements of law, at the time they laid their tracks across Summer avenue, and that the bill discloses no duty imposed by law upon them, by reason of the changed conditions in the increase of the trains upon defendants' railroad, or in the increase of population and the consequent increase in the number of people passing across the tracks at that crossing.

Second. That this court has no statutory or equitable jurisdiction to prescribe another crossing in substitution of the crossing shown in the bill.

Third. That the bill is defective because it fails to show that an overhead or undergrade crossing at Summer avenue can be practically constructed, and further fails to point out the manner in which the defendants should properly construct the crossing at Summer avenue demanded by the bill.

Fourth. That the twenty-ninth section of the revised Railroad act of 1903, so far as it purports to authorize this court to prescribe a crossing not at grade at Summer avenue, is uncon-

stitutional and void, as attempting to confer on this court the prerogative proceeding by *mandamus* out of the supreme court and as unlawfully assigning to this court legislative powers; and

Fifth. That by the provisions of that section the complainants, before proceeding to file this bill, were required to give notice to the defendants, which does not appear, by this bill, to have been given.

The first contention raises the question of the true construction of the clause contained in the ninth section of the act of incorporation of the Montclair Railway Company, under which act that corporation obtained the franchises which the defendants now exercise, and under which the tracks were laid and are now maintained across Summer avenue at grade. The language in which the legislature expressed its will is the following:

"It shall be the duty of the said company to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby."

Was the duty thus imposed completely performed by the construction of "bridges" under or over the railway where it crossed Summer avenue, which were, at the time of their construction, "sufficient" to prevent the public use from being "impeded" by the railway? It is impossible to give such a construction to the language of this clause. The bridges which it is the duty of the defendants to construct are to be sufficient to permit the passage, in the use of the public easement, of carriages, horses and cattle, so that it shall not be impeded by the railway. If the bridge at first provided becomes insufficient for the required purpose, whether because of the increased business of the railway company, or of the increased use of the public easement in the street, the duty, which is a continuing one, has not been performed.

The ninth section of the original charter of the Central Railroad Company of New Jersey contains a clause identical, in all substantial effects, with the clause of the ninth section of the

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Montclair Railway act above recited. It came under review in *Central Railroad Co. v. State*, 32 N. J. Law (3 Vr.) 220. The supreme court, in the opinion of Chief-Justice Beasley, declared that the clause imposed a duty on the railroad company in favor of the public which was continuous, and the performance of which must be measured by circumstances. The prescribed duty was, it was held, to keep at all times and under all circumstances the public highways at the points where they cross the railroad, in a condition fit for safe and convenient use. The doctrine was again expressed in the supreme court in *Reed v. Camden*, 53 N. J. Law (24 Vr.) 322, and when that case came into review in the court of errors and appeals, while the judgment of the supreme court was reversed, there was no criticism of the doctrine. Chancellor McGill, in this court, in construing a similar clause in the General Railroad act, held that if the crossing constructed originally was not of sufficient capacity it must, from time to time, be enlarged as public accommodation demands. *Raritan v. Port Reading Railroad Co.*, 49 N. J. Eq. (4 Dick.) 11. In *Clark v. Elizabeth*, 61 N. J. Law (32 Vr.) 565, the opinion of Chief-Justice Beasley was cited with approval. Vice-Chancellor Grey declared that the doctrine of a continuing duty, under such legislative prescription, had been adopted by our courts (*West Jersey and Seashore Railroad Co. v. Waterford*, 64 N. J. Eq. (19 Dick.) 663), and his opinion giving expression to this view, in *Palmyra v. Pennsylvania Railroad Co.*, 62 N. J. Eq. (17 Dick.) 601, was adopted by the court of errors and appeals in affirming the decree made on his advice, in 63 N. J. Eq. (18 Dick.) 799. Vice-Chancellor Van Fleet, in *Newark v. Delaware, Lackawanna and Western Railroad Co.*, 42 N. J. Eq. (15 Stew.) 196, declared, and Vice-Chancellor Emery, in *Swift v. Delaware, Lackawanna and Western Railroad Co.*, 66 N. J. Eq. (21 Dick.) 34, assumed, that the doctrine of a continuing duty in such cases is beyond doubt. See, also, *S. C.*, 66 N. J. Eq. (21 Dick.) 452.

In my judgment the bill is not open to the objection made upon this ground.

The claim that no statutory jurisdiction has been conferred on this court to prescribe the crossing to be constructed if any

railroad company shall not properly construct bridges or other crossings of highways as required by law, may be, for the present, passed by with the observation that by section 29 of the revised Railroad act of 1903, the legislature has undertaken to confer, and has conferred by language which is incapable of any other construction, precisely the jurisdiction in question. It is contended, however, that in so doing the legislature exceeded its constitutional powers. This contention will hereafter be considered. That the twenty-ninth section of the act above cited does, by its terms, confer such jurisdiction, has been settled in this court. *Metuchen v. Pennsylvania Railroad Co.*, 71 N. J. Eq. (1 Buch.) 404.

The cause of demurrer, which asserts that this court has no equitable jurisdiction to grant the relief sought by this bill, is evidently aimed at the fourteenth paragraph of the bill, in which the complainants charge that where the right of the public to use a public highway and the right of a railroad company to operate its railroad across such highway are in conflict, this court has the power to regulate and direct the manner of crossing so as to protect the rights of both parties and insure the safety of the public. Such a jurisdiction in this court was obviously asserted and acted upon in *Newark v. Delaware, Lackawanna and Western Railroad Co.*, 42 N. J. Eq. (15 Stew.) 196, for upon no other ground can the opinion of Vice-Chancellor Van Fleet, on whose advice the decree in that case was made, be vindicated. What was said in the opinion of Mr. Justice Reed, in *New York and Greenwood Lake Railroad Co. v. Montclair*, 47 N. J. Eq. (2 Dick.) 591, with respect to the general equitable power of the court, was unnecessary to the decision, for, as was pointed out, the jurisdiction asserted was put solely upon certain legislation which was held to be ineffective. In the subsequent case in this court of *West Jersey and Seashore Railroad Co. v. Atlantic, &c., Railroad Co.*, 65 N. J. Eq. (20 Dick.) 613, such jurisdiction was directly asserted and the decree was made thereon. Under those decisions this contention cannot avail defendants.

It is next contended that the bill is defective in two respects, first, because it fails to show that an overhead or undergrade

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crossing of Summer avenue can be practically constructed, and *second*, because it fails to point out the manner in which defendants should properly construct the crossing of Summer avenue. With respect to this objection the complainants, in my judgment, are not compelled to assert that one or the other crossing is capable of being practically constructed. It is sufficient if their bill presents a case for the exercise of the jurisdiction of this court, leaving for its determination what kind of crossing should be decreed. It would be equally inappropriate, in my judgment, for complainants to set out in the bill the mode of crossing that they think defendants should adopt. If they present a case for the exercise of jurisdiction, they must accept such mode of crossing as the court shall decree, and to seek a decree for a particular mode of crossing might hamper the court and prevent the exercise of its power, whether statutory or equitable, if the mode which the court is asked to decree is not, in its judgment, practicable or fair.

The next contention challenges the constitutionality of the legislation contained in section 29 of the Railroad act above cited. It is argued that the legislature thereby undertook to confer on this court the power which the supreme court may exercise by its prerogative writ of *mandamus*, and the power to fix the mode of crossing by railroads of public highways, which it is claimed the legislature alone can do. I think I am not at liberty to deal with these questions. The legislation contained in section 29 has been pronounced to be within the constitutional power of the legislature in this court, and that decision is binding on me. *Metuchen v. Pennsylvania Railroad Co.*, *ubi supra*. Other legislation of similar scope and effect has also been pronounced constitutional in this court, and that decision has been approved by the court of errors and appeals. *Palmyra v. Pennsylvania Railroad Co.*, *ubi supra*. See, also, *Eckert v. Perth Amboy and W. Railway Co.*, 66 N. J. Eq. (21 Dick.) 437; *S. C.*, 65 N. J. Eq. (20 Dick.) 777.

It is lastly urged in support of the demurrer that the bill is defective in that it fails to state that notice had been given by complainants to defendants of the intention to proceed by suit in equity to obtain relief. This requires a construction of the

language of section 29 of the Railroad act. In my judgment such notice as is thereby prescribed relates only to the proceeding to construct or repair such crossings by the municipality, if the railroad noticed does not, within a reasonable time after such notice, itself construct or repair. That must be done within a reasonable time, the commencement of which is at the giving of the notice. Such notice has a reasonable relation to the proceeding by the municipality to construct or repair, but has no reasonable relation to the application to this court to fix and determine how the crossing should be constructed under the provisions of the law governing the railroad company. This objection cannot prevail.

None of the causes being found good, the demurrer must be overruled, with costs.

With the above case were argued two other cases presenting the same questions. In one of them the bill was filed by the same complainants against the same defendants, and relief of the same kind was thereby sought in respect to the crossing of Fourth avenue in Newark by the same railroad. In the other of them the bill was filed by the same complainants against the Pennsylvania railroad and the New York Bay railroad, and relief of the same kind was thereby sought in respect to the crossing of Clinton avenue in Newark by the railroad owned and operated by the companies last named. The bills were identical in substance with that filed in this case. Demurrers were interposed to each of them, raising the same questions above considered. For the reasons hereinbefore stated each demurrer must be overruled, with costs.

2 Buch.Thompson v. Ramsey.

CHARLES D. THOMPSON

v.

REBECCA E. R. RAMSEY.

[Submitted December 27th, 1906. Decided April 16th, 1907.]

Pending a foreclosure a receiver appointed by this court, and with the approbation of this court, made a lease of the mortgaged premises, expiring October 8th, 1904. The mortgaged real estate was sold by the sheriff to Carr for \$70,000. Carr paid \$5,000 to the sheriff upon the purchase. The sale was confirmed July 5th, 1904. On July 26th, 1904, the sheriff executed a deed to Carr, and notified him that it was ready for delivery. Carr did not pay the remainder of the purchase price and take the deed until September 17th, 1904, when he paid \$65,000 only. On application for the distribution of the rents collected by the receiver—*Held*, that Carr was not entitled to any part of the rents attributable to the real estate mortgaged until after he had performed the conditions of sale and accepted the sheriff's deed.

On bill to foreclose. Application for distribution of surplus moneys.

Messrs. Godfrey & Godfrey, for Charles R. Myers, defendant.

Mr. William M. Clevenger, for Showell & Fryer, defendants.

Messrs. Bourgeois & Sooy, for John H. Carr, purchaser.

MAGIE, CHANCELLOR.

It appears, from the depositions taken, that under a decree in this cause, mortgaged real estate (consisting of the Hotel Shelburne) was sold by the sheriff on the 4th of June, 1904, for \$70,000. There were prior mortgages upon the property, alleged to amount to \$223,000 of principal. The purchaser at the sale was Joseph H. Carr, who paid to the sheriff \$5,000 on the day of sale. Exceptions to the confirmation of the sale were interposed, and pending their consideration, a receiver of the property

was appointed by order of the court, who, with the approval of the court, leased the mortgaged property for a term commencing on the 30th day of June, 1904, and ending on the 8th day of October, 1904, for a rent of \$13,750. The sale was confirmed July 5th, 1904. On July 26th, 1904, the sheriff executed a deed to Carr for the mortgaged real estate and notified him that the deed was ready for delivery. The balance of the purchase price, viz., \$65,000, was not paid by Carr until September 17th, 1904, and then it was paid without any accrued interest. After deducting the expenses of the receivership, and other incidental expenses, there remains in the hands of the receiver, out of the rental money, \$12,204.25, and it is the distribution of this sum which is now sought.

The mortgage foreclosed covered real and personal property. The personal property was the furniture contained in the hotel. This was not sold by the sheriff, because the sale of the real estate was ordered to be made first, and that sale produced more than enough to satisfy the mortgage of the complainant. The lease included the hotel and all its furniture. The rents which were received were due in part to the real estate, and in part to the personal property leased. It becomes necessary to determine what portion of the rents remaining is properly to be attributed to one kind of property, and what to the other kind included in the lease. This becomes necessary because the purchaser of the real estate claims that the rents attributable to the real estate, or at least some part thereof, should be paid to him. There is also a judgment entered upon a mechanics' lien upon the real estate, which can only be paid out of the rents which are attributable to the real estate. As there are also subsequent mortgages which include, or claim to include, both real and personal property, it is obviously necessary to make this discrimination with respect to the rents.

Unfortunately, the evidence leaves this question without much to enable the court to reach a satisfactory conclusion. On one hand, it is claimed that the value of the personal property is less than \$12,000, and that the value of the real estate, as indicated by the amount received at the sheriff's sale, subject to previous mortgages, is about \$300,000, and it is insisted that the

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rents remaining should be proportioned in the ratio which the respective values bear to each other. The valuation of the personal property appears, by the testimony, to be made by a single witness, and it does not seem to be in accord with testimony as to the cost of the furniture and the annual depreciation from the use thereof. On the other hand, it is insisted that real estate, rented, depreciates but little in value if repairs are properly made, while personal property of the nature of this does depreciate quickly and largely in value by reason of its use. There is but a single expert who presents this opinion, but it seems to be in accord with reason. The same expert testifies to the fact that, in Atlantic City, owners of cottages sometimes unite with the owners of furniture, which the latter use in furnishing the cottages for renting, and that in such cases the rents are divided equally between the owner of the real estate and the owner of the personal property. No other witness has been called to express such an opinion, or to indicate such a custom. There is no proof that the custom testified to in renting cottages would be applicable to the renting of large hotels.

This leaves me in perplexity. I have so little to rely upon in making an adjudication as to the equitable division of this fund, that I am inclined to fall back upon a division to be arrived at by a comparison of the value of the real with the value of the personal property.

But, I am not satisfied to fix the value of the personal property at the figure named by the expert witness. According to a calculation made from the cost of the furniture, with the expert's evidence of the yearly depreciation, I think that the value may be fairly fixed at \$30,000, so that if the real estate is deemed to be worth \$300,000, the rents in hand are attributable thus: ten-elevenths to the real estate and one-eleventh to the personal property.

It is next to be determined how these respective amounts are to be distributed among the claimants. First, to whom shall the amount of rents raised from the real estate be paid? The purchaser at the sheriff's sale claims them because he has a sheriff's deed for the leased real estate, dated July 26th, and he insists that his title thereby became perfect as of the date of the sale,

which was June 4th. Subsequent mortgagees and lien claimants insist that the purchaser is not entitled to any part of the rents which accrued from the real estate, unless it be that which accrued after September 17th, when he paid the balance of the purchase-money, or that if he is entitled to the whole thereof, he should not be allowed to take the same, except upon accounting for a fair rate of interest upon the purchase-money retained by him from July 26th, when he was notified that the deed was ready for delivery, until September 17th, when he paid the same.

The contention of counsel for the purchaser at the sheriff's sale is that the title the purchaser acquired by the sheriff's deed relates back to the date of the sale at which he became the purchaser. The appeal is to the doctrine of relation, which is described by Lord Mansfield, in *Vaughn v. Atkin*, 5 Burr. 2764, in this language: "There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation. The formal effectuates the substantial part, and therefore must relate to it."

This definition of Lord Mansfield was treated as expressing the same idea as the definition contained in 18 Vin. Abr. § 8, tit. "Relation," and such was the view expressed by Chief-Justice Ewing in the supreme court in *Den v. Steelman*, 10 N. J. Law (5 Hal.) 193. The principle was applied in the court of errors and appeals in *Jacobus v. Mutual Benefit Life Insurance Co.*, 27 N. J. Eq. (12 C. E. Gr.) 604, where a mortgage recorded before delivery was held to become effectual as against lien claims for labor, &c., upon a building commenced after the mortgage was recorded, but before it was delivered; and this was said to be upon the doctrine that deeds, when delivered, have operation by relation as of a time prior to delivery, if it be necessary to effect the intention of the parties, and be required for the advancement of justice, and Mr. Justice Depue, in delivering the opinion of the court, points out that the equity of the mortgagee was plainly prior to the equity of the lien claims.

But the question before us differs materially from that discussed and decided in the matter last cited. In this case there

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was a decree for the sale of real and personal property to raise money to satisfy a mortgage encumbrance. It was not a decree of strict foreclosure, which is said to be an alienation, but it was a decree for sale, and the defendants were not foreclosed by such a decree until sale. *Pearman v. Gould*, 42 N. J. Eq. (15 Stew.) 4. The sale is to be made by an officer of the court, and must be confirmed by the court, and the title passes by a deed executed by the officer.

As was said by Chief-Justice Ewing, in *Den v. Steelman*, *supra*, with respect to sheriff's sales under common law judgments in this state, the execution and delivery of the deed of the sheriff is the substantial part. In the language of Lord Mansfield, all the rest of the transaction must relate thereto, and the chief-justice distinguished the cases in which the doctrine of relation was properly applied, such as where the person making the conveyance has an estate in the lands, from those cases where the conveyance is made by one having no estate but only a power. In such cases, he held that an estate does not pass until all the acts requisite thereto are completed, and from the last to the first there is no relation so as to sustain an intermediate transfer. The reasoning of the chief-justice is entirely applicable to the case of the delivery of a deed by a sheriff to effectuate a sale made by him under a decree of this court, and I should not have the least difficulty in adopting the view that the sheriff's deed delivered to Carr on the 17th of September, had no relation to the sale on the 4th of June, so as to entitle him to the rents and profits intermediate between the sale and the delivery of the deed, except for the fact that Mr. Justice Depue, in delivering the opinion of the court of errors and appeals, in *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. (2 Dick.) 279, expressed the view that a sheriff's deed, when delivered, had a relation back to the time of the sale of which it is the consummation, and he cited, in support of that doctrine, the case of *Jacobus v. Mutual Benefit Life Insurance Co.*, *ubi supra*.

But an examination of the case of *Morse v. Hackensack Savings Bank* clearly shows that the view thus expressed was wholly unnecessary to its decision. The doctrine of that case was this: that although heirs-at-law took an estate which was alienable,

devisable and descendible, and liable to be seized and sold, in lands respecting which their ancestor had, by will, given power to his executors to sell, yet that a purchaser, under execution, of the estate of an heir would be divested of the estate purchased, whenever the power of sale was exercised, and the purchaser, under the power, would become seized, under the devisor, of a title paramount to the title of the heir by descent. It is obvious that, in the view thus expressed by the court, it was immaterial whether the deed of the sheriff which was claimed to pass the title of an heir-at-law, passed that title as of the date of sale or as the date of the delivery of the conveyance.

I have therefore reached the conclusion that Carr, the purchaser, acquired by the delivery of the deed no right in the rents received from the receiver's lease prior to the 17th of September. Whether he can enforce the payment of rents accruing thereunder after the 17th of September might, perhaps, be questioned, but it seems conceded by all the counsel that he is entitled to the rents between that date and October 8th, when the lease terminated. The evidence as to the rental value for that period is meagre, but it also seems to be conceded that at the rate of \$20 a day, testified to by one of the experts, the sum of \$420 would be due to the purchaser. That sum should be paid out of the amount attributable to the real estate in the above calculation.

When that sum is deducted, there will remain a residuum of the rents received by the receiver, which are attributable to the real estate, and the whole of the rents which are attributable to the personal estate.

The proceeds of the sale of the real estate by the sheriff was sufficient to pay the prior encumbrance of the complainant, and to produce a surplus of over \$40,000, which was applied upon a subsequent mortgage held by one Charles R. Myers. The sum thus applied, did not, however, pay the whole amount due him, but left unpaid a considerable sum. The remainder of the fund in the receiver's hands should be next applied to the unpaid claim of Myers upon his mortgage. As the remainder is composed of money derived from the real estate and money derived from the personal property, I think that each part of the remaining fund should contribute to the payment of Myers' deficiency in propor-

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tion to its amount. The reason for this is, that there is one subsequent encumbrance covering the real estate alone, and there are subsequent encumbrances covering the real estate and which are also claimed to cover the personal property. Whether the remaining rents attributable to the personal property are properly to be applied to the Myers deficiency (if there remain any deficiency after the application of the rents attributable to real estate) will be considered hereafter.

If the rents attributable to real estate and applicable to the payment of the deficiency on the Myers mortgage, when so applied, leave a surplus to be applied to subsequent encumbrances, then the next encumbrance to which it should be applied is the judgment upon a mechanics' lien which, though subject to the Myers mortgage, is, by the judgment of the circuit court, a prior lien to the three next succeeding mortgages. At all events, the lien claim thus put in judgment is entitled to be next paid, but it must be paid from the fund raised from the rents attributable to the real estate alone. If there then remain some part of the rents attributable to real estate, it must be applied to subsequent encumbrances.

One of the subsequent encumbrances is a mortgage covering the same real and personal property, and, perhaps, other personal property, which was executed to one Edward B. Showell, for the benefit of a firm called Showell & Fryer. The interest of the mortgagee in this mortgage does not seem to be affected by the judgment upon the lien claim. Showell was made a party to the lien proceeding, but it was afterward discontinued as to him. The mortgages of John Wanamaker, Samuel E. Keers and Walter R. Lewis, who were made parties to the lien proceeding, were expressly adjudged therein to be subject to the lien claim.

In behalf of Showell, it is contended that the lien claimant ought to have made him a party to the lien proceeding and procured a judgment fixing the priority of the lien and his mortgage, under the provisions of the Mechanics' Lien act, supplement of 1884 (*2 Gen. Stat. p. 2072*), and of the revised Mechanics' Lien act of 1898 (*P. L. 1898 p. 547*), which require the summons to be issued against every person holding a mort-

gage of record against the lands which would be cut off by a sale under the lien claim. His insistence is that by the discontinuance of the proceeding as to him, and the failure to include in the judgment a fixing of his priority, his mortgage has been advanced above those of Wanamaker, Keers and Lewis, which were expressly adjudged to be subject to the lien claim.

I am unable to agree with the view contended for, or with the conclusions sought to be drawn therefrom, viz., that his mortgage thereby was within the doctrines of *Clement v. Kaighn*, 15 N. J. Eq. (2 McCart.) 47, and *Hoag v. Sayre*, 33 N. J. Eq. (6 Stew.) 552. The legislation which now requires a mortgagee, whose mortgage would be cut off by a sale upon a lien claim, to be made a party to the lien claim proceeding, does not prescribe what will be the effect of a failure to do so. It does not advance the omitted mortgage over the lien claim or over other mortgages. It results that the contention made in behalf of the Showell mortgage cannot avail the mortgagee. If any of the fund attributable to the real estate remains after payment of the lien claim, the surplus should be applied to the three mortgages of Wanamaker, Keers and Lewis, in order of priority, which will doubtless exhaust the whole of that part of the fund.

The only question remaining is as to the disposition of so much of the fund as was raised by the lease of the personal property. By a cross-bill in the foreclosure of *Myers v. Ramsey*, and in other modes, all the mortgages are attacked with respect to their being liens upon personal property. The contention is that they were not recorded in the manner required by law. I think that every one of the mortgages in question has failed to become a lien as against other mortgagees or purchasers in good faith.

The mortgage of Charles R. Myers was recorded as a real estate mortgage on October 11th, 1900. The affidavit to the chattel mortgage was made October 15th, and it was recorded on October 29th, 1900. The affidavit did not truly state the consideration of the mortgage, and the mortgage was not recorded within a reasonable time.

The mortgage of John Wanamaker was recorded as a real estate mortgage on October 15th, and although the affidavit was made on the same day, it was not recorded as a chattel mort-

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gage until October 20th, 1900. This affidavit was made by an attorney-at-law, who was the attorney of Wanamaker, and he declares therein that the true consideration of the mortgage was for goods, wares and merchandise sold and delivered by Wanamaker to Rebecca Ramsey. It would seem that his knowledge must necessarily have been acquired from information derived from others. The attorney, when called as a witness, admitted that the only knowledge he had of the transaction was derived from a conversation with an agent of Wanamaker. Besides, the mortgage was not recorded as a chattel mortgage within a reasonable time.

The mortgage of Keers is defective as a chattel mortgage because, although the affidavit was taken upon the 15th of October, it was not recorded until the 31st of October, 1900.

The mortgage of Showell and Fryer is also defective because, although dated December 15th, 1900, and recorded as a real estate mortgage on January 19th, 1901, the affidavit thereto was made December 3d, 1902, and it was recorded as a chattel mortgage December 8th, 1902. *Graham Button Co. v. Spielmann*, 50 N. J. Eq. (5 Dick.) 120; *S. C.*, 50 N. J. Eq. (5 Dick.) 796; *Roe v. Meding*, 53 N. J. Eq. (8 Dick.) 350; *Dunham v. Cramer*, 63 N. J. Eq. (18 Dick.) 151; *Watson v. Rowley*, 63 N. J. Eq. (18 Dick.) 195; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 65 N. J. Eq.-(20 Dick.) 181.

This review indicates that every one of these mortgages fails to be effective as against *bona fide* purchasers or mortgagees in good faith. But they are effective as against Mrs. Ramsey. It is suggested in the briefs that the Hotel Shelburne Company may hold the personal property in the hotel as a purchaser free from these mortgages. But it appears that the deed from Mrs. Ramsey to the Atlantic Title Company, trustee, dated July 12th, 1891, gave notice of these mortgages as being encumbrances on the personal property in question. The deed from the Atlantic Title Company, the trustee to the Hotel Shelburne Company, recites the former conveyance as the source of the title conveyed, and therefore the hotel company became a purchaser with like notice.

It follows, therefore, that the mortgages are effective also

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against the purchaser from Mrs. Ramsey, and they stand in the order of the priority of date so far as they affect personal property. Whatever remains of the fund raised from the rents of the personal property must be distributed among them until it is exhausted, in the order of such priority.

The opinion thus expressed disposes of the other case above named, arising upon the bill of Charles R. Myers and the cross-bill attacking the various mortgages, and a decree in that case would be made upon the lines of this opinion. As Myers' claim may be wholly discharged by the distribution in this cause, there can be no action taken or decree made with reference to the personal property, none of which appears to have been sold.

As this appears to be analogous to an application for surplus money in court, I think the costs of the proceeding should be taken from the fund before distribution is made.

SYLVAN G. BUSHEY

v.

THE NATIONAL STATE BANK OF CAMDEN et al.

[Argued December 19th, 1906. Decided April 16th, 1907.]

Mortgages were made to H. L., who was president of a national bank, to secure moneys due to that bank. H. L. filed a bill to foreclose them, and did not make the bank a party thereto. A decree of foreclosure followed, and upon the *fiery facias* thereon issued the sheriff exposed the mortgaged premises to sale, and the complainant in this cause bought three of the mortgaged tracts. These tracts had been sold for taxes, and certificates of sale had been issued which the bank had acquired by assignment, and was proceeding to obtain declarations of sale thereon. On bill to enjoin the bank from enforcing the certificates—*Held*, (1) that the mere fact that the bank had not been made a party to the foreclosure exhibits no equity to sustain the relief sought; (2) if the bank (if made a party to the foreclosure) would have been compelled to bring in its claim under the tax sales, to be enforced with the mortgage debt, an

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equity might arise thereon, but as the bank acquired its claim, not by redemption under notice from the purchasers, but by an assignment of the rights of the purchasers, which gave a prior lien on the lands, it would not have been compelled to bring them into the foreclosure; (3) the claim that a solicitor of this court, attending for the bank at the foreclosure sale, made representations to the complainant in this cause before he purchased which estopped the bank from enforcing against him the rights it acquired by the assignments of the certificates of sale is not made out by proofs.

On bill for relief.

Mr. Ralph W. E. Donges, for the complainant.

Mr. Edward Dudley, for the defendants.

MAGIE, CHANCELLOR.

The purpose of this bill is to procure a decree declaring null and void certain certificates of sale of lands for taxes assigned to and held by the National State Bank of Camden, and an injunction restraining the defendants from assigning said certificates, or proceeding to collect the sums due thereon, or from applying for a deed in fee-simple for the lands named in said certificates.

The case has been brought to hearing upon the bill, answer and replication, and a stipulation of the parties that the affidavits annexd to the bill and the affidavits annexed to the answer shall be considered and treated as depositions in the cause.

From these affidavits there are certain facts appearing without contest. On the 10th of July, 1903, the complainant, Bushey, bought from the sheriff of Camden county three tracts of land which were exposed by the sheriff to public sale. The sale was made upon a *feri facias* issued out of this court, and the writ was issued upon a decree in a cause in which Heulings Lippincott, one of the defendants, was complainant, and Aaron Ward and his wife were defendants. That bill was filed for the foreclosure of two mortgages given by Aaron Ward to Heulings Lippincott, and Aaron Ward and his wife were the sole defendants so far as appears. The mortgages were made by Ward to Lippincott, not for any indebtedness due to Lippincott, but to secure

the National State Bank at Camden money owed to it by Ward, and the mortgages were made to Lippincott because he was the president of the bank. While the mortgages were outstanding, and before the bill to foreclose them was filed, the mortgaged lands, including those bought by complainant at sheriff's sale, had been sold for taxes. Some of them had been bought by the city, and one tract by a third person. The sale was under the Martin act, and certificates were duly issued to the purchasers. The bank purchased and took assignments of all the certificates affecting complainant's land before the bill to foreclose the mortgage was filed. It was about to apply, or had applied, to the city for a deed for said lands.

It further appears that, at the time the lands were exposed to sale by the sheriff, some conversation occurred between the complainant and a solicitor of this court, who appeared at the sale in behalf of the bank. What the conversation was is a matter of contest. The complainant and the solicitor disagree in their recollection of it, and there is no other evidence of what was said by the parties to the conversation.

It is first suggested that the foreclosure proceeding was defective, in that the National State Bank of Camden, for whose use the mortgages were held, should have been made a party thereto. The complainant, however, having bought the lands under the decree made in that cause, and having taken the sheriff's deed, after the sale had been confirmed without objection from the defendants in that cause, or from him as a purchaser, cannot, in this collateral way, object to the proceedings therein, or found any equity upon the supposed error in the foreclosure. If the defendants in that cause might have objected to its being proceeded with in the absence of the bank, the *cestui que trust* of Lippincott (*Tyson v. Applegate*, 40 N. J. Eq. (13 Stew.) 305, and *Johnes v. Outwater*, 55 N. J. Eq. (10 Dick.) 398), they presented no objection and the cause went to a decree. Complainant's purchase on the *feri facias*, issued on the decree, conferred on him the title which Lippincott had acquired by the mortgages, and the title of the mortgagors who made them. *Boorum v. Tucker*, 51 N. J. Eq. (6 Dick.) 135; *Wimpfheimer v. Prudential, &c., Co.*, 56 N. J. Eq. (11 Dick.) 585; *Champion v.*

Hinkle, 45 N. J. Eq. (18 Stew.) 162. If the bank were setting up any claim under the mortgage taken by Lippincott for its benefit, doubtless, upon the facts shown, that the sale produced all that was secured thereby, which presumably has been paid to it, an injunction against the presentation of that claim would be allowed. But the mere fact that the bank was not a party to the foreclosure does not present any equitable ground for relief.

But the contention is that if the bank had been made a party, it would have been obliged to put in and enforce in that proceeding the rights which it had acquired under the assignments of the certificates of sale, and that it was inequitable to so conduct that cause as to omit the claim which the bank had in that respect.

If the complainant had sought relief from his contract to purchase, or opposed the confirmation of the sale, the existence of an outstanding lien not affected by the foreclosure proceedings would not have justified relieving him from his obligation. The lien of the taxes and the sales thereunder could have been discovered from the public records. A purchaser at a judicial sale who neglects to acquire such information, and deliberately assumes the hazard of buying in ignorance, must bear the consequences of his negligence. *Hayes v. Stiger*, 29 N. J. Eq. (2 Stew.) 196.

It is obvious that the contention now under consideration will have no force unless the bank, if made a party to the foreclosure suit, would have been compelled to set up therein its interest as an assignee of the tax certificates.

When taxes are unpaid a municipality may enforce the lien which is given to that burden upon the land, by a sale under the provisions of the sixth section of the Martin act, which seems to be yet substantially in force. The purchaser at a sale for taxes may give notice of the sale to the mortgagee holding a mortgage upon the lands, and the mortgagee may, thereupon, redeem the lands by paying to the treasurer of the city for the use of the purchaser the sum paid by the purchaser, with interest. 3 Gen. Stat. p. 3372 § 415. By the eighth section of a supplement to said act, approved April 18th, 1889, a mortgagee who redeems land sold for taxes may retain a first lien thereon

for the amount paid to procure the redemption, with lawful interest, and the payment of other taxes afterward assessed thereon. *3 Gen. Stat. p. 3381 § 442.*

By the second section of a supplement to the same act, approved May 23d, 1890, a redeeming mortgagee is given power to enforce a lien acquired by the redemption by any appropriate proceedings which the section provided may be instituted and maintained, either independently of, or before, or in connection with the proceedings to enforce the mortgage. *3 Gen. Stat. p. 3383 § 449.*

Under this legislation it is plainly open to question whether, if the bank in the case under consideration had been notified by the purchasers of the mortgaged premises at the sale for taxes, and had redeemed the property, it would not have been compelled, if made a party to the foreclosure, to enforce its claim in connection therewith.

But this was not the transaction which occurred. It does not appear that any notice whatever was given to the bank, and the bank did not, in fact, redeem under the provisions above referred to. On the contrary, the bank proceeded to acquire the title or interest which the purchasers at the tax sale had acquired, and which was represented by the certificates of sale held by them. The city was the purchaser of some of the tracts. By the provisions of a supplement, approved April 16th, 1891, the city was expressly authorized to become a purchaser at a sale of lands for taxes, the same as any other purchaser, and the certificate of sale is to be made to the city, and the mayor, in behalf of the city, may cause the notice otherwise required to be served on the owners and mortgagees of the land purchased, and the city may be entitled to a deed in the same manner as any other purchaser, if the lands are redeemed from the sale. *3 Gen. Stat. p. 3384 § 453.* By a supplement, approved March 23d, 1895, the certificate of sale issued to any city for lands thus bought may be assigned to any person. *3 Gen. Stat. p. 3390 § 485.* By the provisions of the further supplement, approved March 16th, 1893, an assignee of a certificate of sale given under the acts may give notice to the mortgagees and owners and acquire the title to the lands and receive a deed therefor in the same manner as

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if the assignee had been the original purchaser at the tax sale.
3 Gen. Stat. p. 3389 § 478.

It is to be noted that, although the sheriff's sale in this case was made after the passage of the act for the assessment and collection of taxes, approved April 8th, 1903, the provisions of the sixty-sixth section of that act prevented its operation on taxes previously in default, for the act was expressly declared to take effect only on the 20th of December, 1903.

Under the above provisions, it is obvious that the bank acquired by the purchase and assignment of the certificates of sale of the mortgaged lands a lien which was superior to the lien of the mortgage in which it had an interest. If the bank had been a party to the foreclosure proceedings, it need not have included the lien thus acquired in its demand for relief. If it had been made a party defendant and had answered claiming a prior lien, it might have been dismissed from the case, and probably would not have been required to present its claim except for the purpose of redemption. As the holder of a prior lien claim which, if made a party to the foreclosure proceeding, the bank would not have been obliged to enforce therein, no equity arises because the bank was not made a party.

It is further contended that the assignments of the certificates of sale to the bank vested no property or interest in it, because of the limitation on the power of national banks, contained in the legislation of congress. It is conceded that a national bank may acquire property of this sort to protect debts due to it.

As it appears in this case that the bank, as a *cestui que trust* in the mortgage made to Lippincott, held an interest in the lands in question, and as it is proved that the bank purchased the certificates of sale and procured their assignment to it for the purpose of protecting its mortgage interest, I deem it free from any doubt that the bank lawfully acquired such interest as was passed to it by the assignments.

It is lastly contended that the solicitor who attended this sale in behalf of the bank procured complainant to purchase the three tracts by the representation that if complainant bid for them a certain amount all claims of the bank would be dis-

charged. The contention is that the bank is now estopped from setting up a claim which it then held. The solicitor, in giving an account of the interview, testified that the conversation related only to the claims which were the subject of the sale; that the *feri facias* and a statement made therefrom were before the parties, and that any assertion that the bids would cover the claims, related to the claims contained in the *feri facias*, and which were calculated with interest and costs. If the complainant insists that the solicitor's language went further than to represent the amount of the claims for which the sheriff was selling, I think he has failed to establish that by proof. If, however, that was the impression made upon his mind, and he chose to rely upon it as an assertion that the amount bid, made up of amounts in the decree with interest and costs, would discharge all claims of the bank, he encounters these insuperable difficulties: there is no proof that the solicitor was authorized by the bank to act for it with respect to any other claims than those which were contained in the decree procured by Heulings Lippincott, the bank's trustee; and in the next place, the sheriff's deed can only convey the interest of the parties in the mortgage. What that interest is, and to what prior liens it may be subject, an intending purchaser is supposed to discover by searching in the proper place of record.

Upon the whole case I think the complainant fails to disclose an equity to have the decree which he seeks, or any germane decree upon the subject-matter made.

The bill will be dismissed.

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Haggerty v. Badkin.

AUSTIN L. HAGGERTY, administrator, &c.,

v.

JOHN H. BADKIN.

[Decided March 8th, 1907.]

1. Pursuant to the formation of a contemplated partnership between defendant and intestate, the latter paid to defendant \$500 for the benefit of the firm. Almost immediately thereafter intestate died, and pending his sickness defendant deposited such funds in a bank in his own name, and after intestate's death converted the money to his personal use.—*Held*, that intestate's death dissolved the partnership, after which defendant became a trustee of such fund for the benefit of intestate's estate, holding the same in a fiduciary capacity within the Bankruptcy act of July 1st, 1898 (*30 Stat. 551 § 17 subd. 4 ch. 541; U. S. Comp. St. 1901 p. 3428*), exempting from a discharge debts created by misappropriation while the bankrupt is acting in a fiduciary capacity.

2. Where a surviving partner wrongfully misappropriated funds which he held in trust for the estate of his deceased partner, the latter's administrator, in a proceeding in equity to compel the enforcement of a decree for the payment of the money, was entitled to process against defendant's body, which would be executed in the absence of proof that defendant was unable to obey the order.

In proceedings for contempt.

Mr. James Steen and Mr. William D. Tyndall, for the complainant.

Mr. Archibald C. Hart, for the defendant.

PITNEY, V. C.

This is a proceeding to compel the defendant to pay to the complainant the amount of a decree recovered by the latter against the former in this cause on the 5th day of January, 1905, for upwards of \$500, besides costs.

The motion is resisted on two grounds.

The first and principal ground is a discharge in bankruptcy,

granted a year later by the district court of the United States, for the district of New Jersey, which purports to discharge defendant from all debts and claims which existed on the 10th day of May, 1905, "*excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.*"

The complainant replies to this defence that the debt for which the decree was granted is within that exception, and he relies on the fourth subdivision of section 17 of the Bankruptcy act, where are enumerated the several exceptions; the fourth of which is: "Such debts as were created by his fraud, embezzlement, *misappropriation* or defalcation while acting as an officer or in any *fiduciary capacity.*"

The complainant contends that the debt herein arose by a *misappropriation* to his own use of money which had been confided to him by complainant's intestate in a *fiduciary capacity.*

To sustain this contention resort is had to the original bill in the cause, the answer thereto and the proofs and facts appearing at the trial, and the findings of the court thereon.

The bill charges that the intestate, in his lifetime, about the 20th of May, 1902, being in negotiations with the defendant in reference to a proposed partnership between them, deposited with the defendant the sum of \$500 as and for his share of the partnership capital. The bill farther shows that immediately after such deposit complainant's intestate was taken violently ill, and died of the illness on May 26th, and alleges that the actual formation of the partnership was interrupted by such illness and was never consummated.

The answer of the defendant denies these allegations, and sets up that there were in fact negotiations between the parties as to the formation of such partnership, but that the plan for such partnership did not include the use of any capital; that the defendant was employed as a salesman for a furniture house, and complainant's intestate desired to join him in the business of selling furniture, and that in order to carry out that plan it was necessary for defendant to abandon his present business connection, which was valuable, and that intestate paid him the \$500 as a personal compensation to him for giving up his then present lucrative job.

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The cause came on for hearing before me as vice-chancellor and I found the issue in favor of the complainant, and as a matter of fact, that the \$500 was paid to the defendant as a contribution to partnership assets and funds.

I have since read over the stenographer's minutes of the evidence and my oral reasons for the decree and am entirely satisfied with the result above stated.

It appeared at the hearing that the complainant's intestate, at the date of the transaction, May, 1902, was twenty-four years old and single, and resided with his mother in Hackensack, New Jersey, and worked as a clerk on a small salary for his uncle, a New York business man.

The defendant was a married man, about fourteen years older than intestate, and lived with his wife in Hackensack.

He was a salesman on a salary of \$30 per week for a New York furniture house.

Neither of the parties had any capital nor were either engaged in any business of any sort for themselves.

The defendant kept no bank account, but brought his weekly wage home to his wife every Saturday night, and handed it to her after the fashion of an ordinary mechanic.

In this state of affairs, about the 1st of May, 1902, the parties entered into negotiations to enter into the business of selling furniture as partners, and it was supposed that they would need a little capital in the business, presumably to pay traveling expenses and the like, which, under the arrangement between defendant and his employers, were paid by his employers in addition to his weekly wage. For the purpose of supplying this capital it was arranged that complainant's intestate should contribute to the business \$500, and the defendant contribute his knowledge and familiarity of the business to stand as an equivalent for the contribution in cash by the intestate.

Complainant's intestate borrowed that sum from his uncle in a check dated May 17th, 1902, drawn by his uncle to his order. On the evening of May 19th (as near as the date can be determined) deceased took the check to the house of the defendant in Hackensack and there endorsed it over specially to him as his contribution to the capital.

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Either at the moment of the endorsement or immediately after deceased was taken violently ill with malignant diphtheria.

Defendant took the check to New York and opened an account in his own name in a bank and deposited the check to his own credit. The date of the entry in the book is May 20th.

He called to see the deceased the same evening and found him very ill. They had some conversation on business matters heard in part by the deceased's mother, who heard the deceased say to the defendant, "Let that remain for a few days."

It appeared that no written contract had as yet been entered into between them, but typewritten sheets embodying a contract, with corrections, were found in the possession of the deceased. He died on the 26th of May.

Defendant called at once upon the uncle who had advanced the money, and the uncle recited to him the terms of the contract as hereinbefore stated, and he admitted it to be correct. He speedily used the \$500 for his personal use.

The evidence satisfied me that the terms of the contract of partnership were substantially agreed upon, but that the intestate desired to have them reduced to writing.

Under these circumstances the question is whether the debt is excepted from the effect of the discharge in bankruptcy, and that question depends on whether it was received in the first place or afterwards detained by the defendant in a "*fiduciary capacity*." That it was so received or detained I think there can be no doubt, if we give to these words their ordinary meaning.

Money is received or detained by one from another in a fiduciary capacity, when, in the mind of the person handing the money to the other, as such mind is known to that other, it does not become the absolute money and property of that other to do with as he chooses as his own money, but is received by him for a particular purpose in which a person or persons other than the person receiving it is or are interested.

If two persons are in partnership and one is acting as cashier or financial manager and the other pays money to his partner to be used in partnership business, the money so paid is received in a fiduciary capacity. The receiver holds it in trust for the partnership and for the benefit of the partners in proportion to their

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several interests, and neither partner has the right to appropriate one dollar of it to his individual use without the consent, express or implied, of the other party.

Each partner for all the purposes *within the scope of the partnership* becomes the agent of each other partner and of the partnership entity, and when a present partnership is dissolved by death of one of the partners the survivor at once becomes a trustee for the representatives of the deceased.

Now, it seems to me, this sort of *fiduciary capacity* is clearly within the language of the act.

The words "fiduciary capacity" do not, in my judgment, refer to a technical trust such as forms the ordinary basis of treatises on that subject.

Mr. Hill, in his introduction to his work on *Trustees* (at p. 1), defines a trustee as, in the widest meaning of the term, "A person in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another." And he says that that definition also extends to bailees, factors and agents whose duties in their fiduciary character are recognized and enforced at common law.

And Mr. Willis, in his treatise, published in Lord Eldon's time (at p. 1), gives the same definition. The same effect is Mr. Perry in his book, section 1.

The original Bankrupt law of 1841 provided in its first section that

"all persons whatsoever residing, &c., owing debts which shall not have been *created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity*"

might apply to be discharged in bankruptcy.

The fourth section provided that no person who, after the passage of this act, should apply trust funds to his own use should be discharged.

Under that legislation the supreme court of the United States, in *Chapman v. Forsyth*, 2 How. 202, held that a balance due from a mercantile factor to his principal arising out of the ordinary dealings between factor and principal is not a fiduciary debt in the

meaning of that act. Justice McLean, in delivering the opinion of the court, held that the cases enumerated in the first section, namely, defalcation by *public officer, executor, administrator, guardian and trustee*, were special trusts, the "other fiduciary capacity" mentioned must mean the same class of trusts, and says "the act speaks of technical trusts and not those which the law implies from the contract." He then refers to the fourth section of the act which provided that the discharging certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of said bankrupt as are provable under the act, and may be pleaded as a complete bar. And the court further held that the creditor entitled to the exception must appear and show in the bankrupt court that he was entitled to the exception and that the court for that reason had no jurisdiction as to his claim.

Notwithstanding this decision the supreme court of New York four years later, in *White v. Platt*, 5 Den. 269 (1848), under the same act, held that a debt was not barred by an act of bankruptcy which arose under the following circumstances: Defendants were indebted to plaintiff in a sum certain. They transferred to him certain promissory notes as collateral to secure the indebtedness. Before the maturity of these notes the plaintiff returned them to the defendants to collect them on plaintiff's account as his agent. Defendants collected the notes and did not account to plaintiff therefor. The court held that they received them in such a fiduciary capacity that they were not discharged by a discharge in bankruptcy. This case has never been doubted, but was cited with approval by Judge Strong, speaking for the supreme court of the United States, in *Clark v. Iselin*, 21 Wall. 360 (at p. 368). Here a transaction in all respects similar to that involved in *White v. Platt*, *supra*, is thus characterized in the headnote:

"When a person, borrowing money of another, pledges with that other a large number of bills receivable as collateral security for the loan (many of them overdue), the pledgee may properly hand them back to the debtor pledging them, for the purpose of being collected, or to be replaced by others. All money so collected is money collected by the debtor in a *fiduciary capacity* for the pledgee."

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I stop here to say that the distinction between the New York case and the one in *Chapman v. Forsyth*, *supra*, is one which runs through all the cases and is noticed by the judges, namely, that a factor who sells goods for a principal naturally and in the ordinary course of business mingles the proceeds of the sales with his own money and the amount at once becomes a simple debt, and that the principal or consignor of the goods is presumed to have notice of the ordinary course of business. In fact it is a pure mercantile transaction resulting in an implied contract and the natural remedy is by action of assumpsit at common law. In the case in New York and others I shall have occasion to cite there could be no such usual course of business, and it was the duty of the debtor defendants, as soon as one of the collateral notes entrusted to them for collection was paid, to transmit the proceeds *instantly* to their creditor.

The act of 1867 varied in its language from that of 1841. It provided, not in the first section, as in that act, but in the thirty-third section, that "no debt created by the fraud or embezzlement of the bankrupt or his defalcation as a public officer or while acting in any fiduciary character" shall be discharged under the act. The contrast between this section of the act and the corresponding section of the prior act is manifest. By dropping out the word "other," found in the first section of the old act, the legislature divorced the words "fiduciary capacity" from the list of specific trust positions enumerated in the older act. Moreover its position in the statute is significant. And this was the view taken by many federal and state courts when that act first came under judicial consideration. Judge Blatchford, then district judge, so held in *Ex parte Seymour*, 6 *Int. Rev. Rec.* 80; 1 *Ben.* 348, and his view was approved by Justice Nelson of the supreme court of the United States in *In re Kimball*, 6 *Blatchf.* 292, and by many other judges.

As late as 1882 Judge Pardee followed those judges in *Fulton v. Hammond*, 11 *Fed. Rep.* 291. In that case Hammond had received from the clerk and master in the chancery court of Lincoln county, Tennessee, a sealed bill made to him in his official capacity for a large sum of money for collection, signing therefor a receipt (containing a copy of the note) in these words: "I

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receive said note to collect without suit, if practicable. If not, I am to employ counsel and collect by suit if necessary." In a suit by the successor in office of the original payee to recover the amount collected by Hammond the latter pleaded a discharge in bankruptcy. Judge Pardee declined to allow the plea, referring to *White v. Platt, supra*, and the cases decided by Judge Blatchford and Justice Nelson above cited, and held that the distinction is clear between the case of a commission merchant or cotton factor selling goods in the ordinary course of business and a man employed to collect money. He shows distinctly and clearly that the case of *Chapman v. Forsyth, supra*, does not apply to the act of 1867. So far as I can find *Fulton v. Hammond* has never been questioned.

But notwithstanding the line of cases of which *In re Kimball* is one, a somewhat different construction was finally put upon the act of 1867, and a different line of decisions was adopted which culminated in *Hennequin v. Clews, 111 U. S. 676 (1884)*.

Hennequin was a French merchant doing business under a letter of credit on London issued by Clews & Company, New York bankers. Hennequin's practice was to draw upon the strength of his letter of credit on Clews & Company on time and before the draft matured to put Clews & Company in money to meet it. The transaction amounted to an acceptance in advance by Clews & Company of Hennequin's bills of exchange, but no debt arose from Hennequin to Clews & Company until the latter was obliged to pay the draft. In point of fact no debt ever did arise, because Hennequin always provided funds in advance. But in order to secure Clews & Company according to mercantile custom, Hennequin deposited with Clews & Company certain collateral securities in the shape of negotiable bonds. In that state of things Clews, being pressed for money, pledged or disposed of the collateral deposited with him and then failed, and got a discharge in bankruptcy. The court of appeals of New York (77 N. Y. 427) indirectly, and the supreme court of the United States (111 U. S. 676) directly, held that his discharge in bankruptcy released that particular debt.

Justice Bradley, speaking for the latter court, held that the question was covered by the previous case of *Neal v. Clark, 95*

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U. S. 704. In dealing with the question, however, the learned justice (at p. 680) gives a long list of cases in which the federal and state courts had taken a contrary view, including therein the cases decided by Judge Blatchford and Justice Nelson, *supra*, and a case in Missouri and several others, citing only two cases in accord with the decision which the court was pronouncing.

But (at p. 683 *et seq.*) he shows that the English authorities dealing with nearly or quite similar language were decidedly the other way. He does not cite the case of *Fulton v. Hammond*, *supra*, decided by Judge Pardee.

The case of *Neal v. Clark*, *supra*, referred to by Justice Bradley in *Hennequin v. Clews*, was this: The executor of an estate sold some of its assets to Neal at somewhat of a sacrifice. The executor was then a man of large property and undoubted solvency. Neal made no inquiry as to the condition of the estate, and the executor gave him as a reason for selling the securities that the estate was in debt to him for moneys advanced. Ten years after Neal purchased the bonds and seven years after the executor had become insolvent and left the state, after having previously given a new bond as executor, Clark and Holland as sureties on that bond, brought an equity suit against Neal and others and charged the executor with a *devastavit* in selling the bonds to Neal, and that Neal, in view of the circumstances under which he received the bonds, became a participant in that *devastavit*. Neal had been discharged in bankruptcy in the meantime and pleaded his discharge in the suit. The Virginia court held him liable on the *devastavit*, and refused him the benefit of his discharge in bankruptcy, which discharge contained the same exception as that found in the one dealt with here. He was held liable in the Virginia courts on the ground that he had been guilty of fraud or embezzlement under the act of 1867. The force of the words "acting in a fiduciary capacity" were not at all involved. The supreme court of the United States held him entitled to the benefit of the discharge on the distinct ground that the debt was not "created by the fraud or embezzlement" of the bankrupt.

With great respect I am unable to see how that decision can

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be said to directly support the decision in *Hennequin v. Clews*, to except Clews from the charge of fraud or embezzlement.

Hennequin v. Clews was followed by *Palmer v. Hussey*, 119 U. S. 96 (1886). There the plaintiff had loaned to Hussey a large quantity of United States bonds under a written contract by which Hussey agreed to hold the bonds subject to the plaintiff's order, collect and pay him the coupons free of charge, and "allow him two per cent. per annum interest on the par value of the bonds." The acceptance of that contract by the plaintiff from Hussey amounted to an implied permission to Hussey to make use of the bonds in his business, presumably by borrowing money on them, for how otherwise was he able to pay interest for their use? And if he was permitted to use them by borrowing money on them, they were, of course, at the ordinary risk of mercantile transactions. The case cannot be distinguished from any ordinary loan of money.

Another case was *Noble v. Hammond*, 129 U. S. 65 (1888). There Hammond had a claim against a railroad company, and, for his own convenience, drew an order on the company in favor of Noble, who was engaged in business, for the amount, and handed it to him for the purposes of collection. Noble asked Hammond what he was to do with the money when collected, and was told by Hammond to keep the money until called for. That was Hammond's account of it. Noble's account was that he was to keep and use the money until called for. In any point of view it was plain that Noble expected Hammond to keep the money as an ordinary deposit as a bank would keep it. Hammond was a business man using considerable sums of money, in perfectly good standing and having no reason to suppose that he was liable to financial trouble, and while in that condition collected \$1,000 from the railroad and mixed it with his own funds. Shortly afterwards, through an unanticipated business loss, he was compelled to go through bankruptcy. It was found as a fact that there was no evidence tending to show actual fraud or any fraudulent intent in defendant's mingling the money with his own. The supreme court held that he was discharged by those proceedings. There it was plain that the transaction amounted to a loan by Hammond to Noble.

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A still later case is *Upshur v. Briscoe*, 138 U. S. 365 (1890). In that case one Andrews made a present to his daughter Annie of \$10,000 and placed the money in the hands of Briscoe, accompanied with a written contract which amounted to a special settlement of the money upon his daughter and her heirs, and at the same time to an absolute covenant on the part of Briscoe sooner or later to pay the whole sum of money with interest. Briscoe thereby became an absolute debtor and at liberty to treat the money as his own. It was not contemplated or provided for that he should hold the money as trustee and invest it for the benefit of the *cestui que trust*. The transaction amounted to an absolute obligation on Briscoe's part. Under those circumstances the court held that the discharge in bankruptcy barred a claim against him personally, but the court enforced it against an estate which he had transferred to his wife fraudulently in anticipation of bankruptcy. This was, on its face, a "technical trust," and hence was within some of the definitions given by the judges in construing the language here in question. They said the words "fiduciary capacity" referred to a "technical trust." But the court, in *Briscoe v. Upshur*, did not rely on the form of the affair, but on the actual substance, and distinctly relied on the fact that an absolute debt by Briscoe was created by the instrument.

We come now to the act of 1898. The language of that portion of the act here in question is variant from the act of 1867 above cited, and is as follows: "Except such as were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." The act of 1867 speaks of a debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer or while acting in any fiduciary capacity. Here the word "misappropriation" is added. The meaning of that word as given in the dictionaries is "wrong appropriation" (Webster), and according to the Encyclopedic Dictionary "to appropriate wrongly or wrongfully; to turn or put to a wrong purpose; the act of misappropriating or turning to a wrong purpose."

I can well perceive that, as used in this statute, the misappropriation must have been consciously done. The party must have

known and felt at the time that he was misappropriating the money.

The only case in the supreme court of the United States to which my attention has been called, construing this part of the act of 1898, is *Crawford v. Burke*, 195 U. S. 176 (1904). That was a suit much like *Hennequin v. Clews*. The bankrupt was a broker who, as a part of his business, bought, held and carried stocks on a margin for his clients, and in the ordinary course of his business bought and carried stocks for Burke. The transactions between them were the ordinary gambling transactions in stocks carried on a margin. While so doing the bankrupt sold out his principal's stock without his knowledge. Pending a suit in trover to recover damages for converting the stocks so sold the broker obtained his discharge in bankruptcy and pleaded it *puis darrein continuance*. It was held by the supreme court of Illinois that the discharge was no bar. On error to the supreme court of the United States that court held that the fiduciary capacity did not exist. The distinction between that case and the present is clear.

It remains to consider some cases in our own state. Among them are *Gibson v. Gorman*, 44 N. J. Law (15 Vr.) 325. There the question arose as to the effect of a discharge in bankruptcy under the act of 1867 upon a judgment recovered in assumpsit. The debt arose out of two payments by the plaintiff in the judgment to the defendant in the judgment of the advance money or deposit on a purchase of lands which the defendant had for sale as an agent. The money was paid to him in the ordinary course of business. The sale in one instance was never completed on account of some supposed defect in the title, but the deposit was held by the agent for a long time in hopes that the title would be completed. In the other case the advance payment was withheld under a claim of commissions. Both sales fell through. It was held that neither of the sums was received in a fiduciary capacity, but were paid in the ordinary course of business in which the parties were engaged, and it was only by reason of what was claimed to be the defect in the title in the one case and a misunderstanding as to price in the other that the plaintiff was entitled to recover at all.

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Another case is *The Smith & Wallace Co. v. Lambert*, 69 N. J. Law (40 Vr.) 487. That case was on demurrer to a replication to a plea of discharge in bankruptcy which set up simply that the cause of action was excepted from the operation of a discharge in bankruptcy because it was created by fraud. It was held that the replication was bad. The question here involved was not there involved or discussed.

The latest case is *Reeves v. McCracken*, 69 N. J. Eq. (8 Robb.) 208. The bill in that case was filed for an account of moneys received by McCracken to the use of the complainant in the sale of lands conveyed by the complainant to the defendant in trust for complainant. The fact was that it had been so conveyed by complainant to defendant in fraud of complainant's creditors, and that no written declaration of trust had been made. It was held that the money could not be held to have been received in a fiduciary capacity, because there could be no trust in the case—*first*, because no trust was declared in writing, and *second*, because the fact that the conveyance as between the parties was valid and binding, and the complainant could never have recovered back the land from the defendant on the ground of a lack of consideration for the conveyance, but was absolutely bound by it because made to defraud creditors.

The learned vice-chancellor does indeed cite and comment upon many of the cases I have already cited, and relies upon them to show that only a technical trust, so called, is within the meaning of the words "fiduciary capacity" as used in the seventeenth section of the Bankruptcy act. But, with great respect, I do not think that that question was involved in the case before him; and further, I am of the opinion that the case is clearly distinguishable from the present.

The complainant herein appeared before the judge in bankruptcy and objected to the discharge of the defendant on the ground of fraud in the creation of the debt, and the learned judge was unable to find any fraud in the case as presented to him, which was simply the pleadings in the suit in equity which resulted in the decree. I do not find from his opinion that he discussed the question of fiduciary capacity.

The question whether the claim is excepted from the discharge

is one for the forum where it is pleaded to determine, and hence is entirely within the jurisdiction of this court, as held in *Marshall Paper Co. v. Train*, 102 Fed. Rep. 872; 43 Cir. Ct. Ap. 36.

I have already referred to the reasoning by which the courts have held that the ordinary relation between factor and principal was not fiduciary within the meaning of that word here involved. It is that those transactions are mercantile transactions in which the principal must have known that his factor would, in the ordinary course of business, mingle the money received from the sale of his goods with his own, and that the ordinary relation of debtor and creditor arose out of those transactions, and that it was not the duty of the factor to earmark or segregate the proceeds of the sale of his principal's goods and remit at once. In fact, the ordinary course of business in such cases renders such restrictive dealing impracticable. The principal often obtains from the factor money in advance upon his goods, and the goods are not sold ordinarily in a lump, nor is the payment received in a single lump. The principal relies upon the personal responsibility of his factor. The courts held that it was and is contrary to public policy, as manifested in the Bankrupt law, to except such a large class of unfortunate creditors from its benefits. This consideration covers the case in *2 How.* cited hereinbefore, and all cases of that character.

The same consideration applies in a less striking degree to the case of *Hennequin v. Clews*. There, as we all know, Mr. Clews, like all bankers engaged in the business of issuing letters of credit, had numerous letters of credit outstanding in various parts of this country and Europe. He could not at any moment know how many drafts had been drawn against him upon which he was liable. He could only know the extent of his possible liability at any moment. He did know that his failure to meet one of those drafts would create great disturbance in mercantile circles, and he was justified by mercantile custom in going to extreme lengths in saving himself from a default in accepting and paying any such draft, and that it was to the interest of the holders of his letters of credit, especially of those who had drawn against him, that his insolvency should be averted. Among those who may have drawn upon him was Hennequin.

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Under these circumstances it is by no means a stretch to say that mercantile usage justified him in devoting all these collaterals which he held as security from the holders of his letters of credit to protect himself and his customers, if practicable, from the consequences of failure to protect the drafts drawn by the holders of the letters. The situation brings him without the policy of the law.

Coming now to the case in hand, I find the present case not within the principle upon which those cases were founded, nor within the facts involved in those cases. It had nothing of a mercantile character. The defendant was not engaged in any business which required the use of money. He had no bank account, and opened one in his own individual name with the very money handed to him by complainant's intestate, and immediately after the intestate's death drew it out of bank for his personal use. I think the case is clearly within the case of *White v. Platt*, *supra*, and is within the definition of the words "fiduciary capacity" found in the headnote to *Clark v. Islin*, *supra*, and it is also within the case of *Fulton v. Hammond*, decided by Judge Pardee in the federal court, and cited above. It is also within the ruling of the supreme court of South Dakota in *Shipley v. Platts*, 97 N. W. Rep. 1 (1903). There the plaintiff, the proprietor of a laundry, employed the defendant as a distributor and collector of laundry material, and to collect from the patrons of the laundry their current dues and return the same to the plaintiff, less the defendant's commissions. In an action to recover the moneys so collected and not paid over, defendant set up his discharge in bankruptcy, and the court, relying mainly on *White v. Platt*, *In re Kimball*, *Fulton v. Hammond*, and other cases in the same line, held the discharge no bar. It is true the court did not refer to the cases I have reviewed, decided by the supreme court of the United States.

As applicable to the whole position here, I refer to the case of *Burdick v. Garrick*, decided in the vice-chancellor's court by Vice-Chancellor Stuart, and affirmed on appeal by Lord-Chancellor Hatherly and Sir G. M. Giffard, lord-justices. *L. R. 5 Ch. Ap. 233* (1870). There the contest was over a sum of money held by an agent acting under a power of attorney to sell

lands, with power to invest the proceeds for the benefit of the principal, in the agent's own or anyone else's name. The agent never did invest the money, but deposited it in a bank to the credit of a firm of which he was a member, and it was held that the agent could not set up the statute of limitations, and that the bill in equity was a proper remedy. The judges distinguished *Foley v. Hill*, 2 H. L. Cas. 28, where it was held that the relation between an ordinary depositor in a bank was not that of trustee and *cestui que trust*, but of debtor and creditor. That case has the same characteristic as that of *White v. Platt*, *Fulton v. Hammond* and *Shipley v. Platts*, above cited, namely, that the money or property was placed in the hands of the defendant for a specific purpose which made him a trustee and his situation that of a fiduciary.

But whatever may have been the character in which the defendant herein received the money in the first instance, there can be no doubt as to the character in which he held it at and after the death of the intestate; that death dissolved the partnership at once, and the defendant's legal title to the money became absolute. But he held that legal title strictly in trust for the complainant's intestate. No business had ever been done under the partnership, so that he had no title, on a settlement of the partnership affairs, to any part of it. Feeling the force of this, he set up in his answer to this action an absolute title in the whole sum under what he alleged to be the contract between the parties, namely, that he was to have that money, not as a contribution to the partnership funds, but as compensation to himself personally for giving up his present position as salesman. I found that issue against him expressly, and I found impliedly that, as the partnership business had been arrested and the partnership dissolved by the death of intestate before anything had been done under it, the complainant was entitled to the whole fund.

I have said that on the death of the intestate the partnership was at once dissolved and the absolute legal title to the money became vested in the defendant, and that he held it in trust for the partnership, which in this case amounted to holding it in trust for the complainant's intestate. It was on this ground that

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the action was brought and maintained in this court. That this is the true statement of the relations between the parties cannot be doubted. In *Lew. Trusts* (8th ed., reprint by Flint) 277 (1888) this relation of partners to each other is distinctly recognized, and while it has been held that that relation does not go so far as to prevent the application of the statute of limitations, it seems quite clear that the relation between the personal representatives of the deceased partner and the surviving partner is quite distinct from that between a principal and his factor or agent in the ordinary mercantile relation out of which an action of assumpsit at law will arise, and the universal rule is that resort must be had to a court of equity.

It is true that the doctrine that the surviving partner holds the property of the partnership in trust for the personal representatives of the deceased partner has been repudiated and the contrary held in cases where the rights of third parties or the statute of limitations was involved. The leading case on that subject is *Knox v. Gye*, 5 Eng. & Ir. Ap. Cas. 656 (1872). There the sole question was the operation of the statute of limitations. Lord Westbury uses the following language: "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner the law confers on his representatives certain rights as against the surviving partner, and imposes upon the latter correspondent obligations. *The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner, but when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end.*"

Against this mere dictum, Lord Hatherly (at p. 678) vigorously protests. The other law lords, Lord Chelmsford and Lord Colonsay, agreed that the statute of limitations applied without discussing the question of the fiduciary relations between the parties or relying on it. All agreed that the bill in chancery was the proper remedy. Lord Westbury did indeed hint that the old action at law for an account would lie.

Mr. Clement Bates (2 *Bates L. Part.* §§ 718, 719) reviews

the language in *Knox v. Gye* with ability, and cites cases in support of his criticism.

Whatever may be the proper language to apply to and describe the relation existing between the complainant's intestate and the defendant, it is quite clear that the obligations arising out of the circumstances under which the defendant became indebted to the complainant's intestate were not in the ordinary course of mercantile business, and did not give rise to the right to sue and recover in an ordinary action at law, because it was within the province of the defendant to set up and prove that the fund had become involved and depleted by legitimate use in the partnership venture to which it was contributed as capital before that partnership was dissolved by death. Hence the complainant's proper remedy was a bill in this court for an accounting, precisely as if such a state of facts as I have indicated had existed.

Now, if we go back and review the opinions in the cases I have cited we will find that this distinction in the proper remedies is adverted to, and in a measure relied upon, in determining whether the debt is or not barred by the discharge. It is hardly necessary to advance arguments to show that, the trust relation being established, the use of the fund for his individual benefit was a misappropriation within the meaning of that word in the act.

For these reasons I am of the opinion that the defendant's debt, manifested by the decree, is not discharged by the decree of the bankrupt court.

The next defence set up by the defendant is his inability to pay. For this he relies upon his *ex parte* affidavit read at the hearing, in which he says he has a wife and one child, and receives \$30 per week, or \$1,560 per year, salary, and therefore he cannot pay anything. The same excuse was set up in answer to proceedings similar to these instituted after decree and before bankruptcy proceedings were taken. Then, as now, the defendant relied upon his *ex parte* affidavit. Of course, the complainant is entitled to have the defendant subjected to examination. In the former case the proceedings were dropped or suspended on a verbal undertaking, at my suggestion, that the defendant should pay \$5 per week, which he did for two weeks, and then

2 Buch.Haggerty v. Badkin.

took bankruptcy proceedings. In the present case I think it will be no hardship on the defendant to contract his living expenses to the extent of \$5 per week. This is a mere suggestion to save expense, and need not be accepted by either party, but each may fall back on the regular practice of an oral examination.

The case is clearly one justifying the extraordinary process of the court.

The obligation which is the foundation of this suit arose as soon as the intestate died. It was then the duty of the defendant to preserve the fund so that he could account for and pay it over to the personal representatives of the deceased when appointed and duly accredited. The equitable wrong committed by the defendant was the misappropriation of that fund by treating it as his own and applying it to his personal use.

If the complainant's right had been a legal one, enforceable in a court of law, it would have warranted process against the body. As, however, his right was an equitable one, and enforceable in this court, he is entitled to the corresponding remedy of this court, subject, however, to this exception, that while in a court of law the process against the body would be issued without regard to the defendant's personal ability to pay, and he be remitted to his remedy by insolvent proceedings, in this court he will not be deprived of his liberty if it appears in advance that he is unable to respond and obey the order of the court.

This view is entirely in accord with that of the court of errors and appeals in *Grand Lodge Knights of Pythias v. Jansen*, 62 N. J. Eq. (17 Dick.) 737. The foundation of the decree in that case, as shown by the opinion in the original cause (56 N. J. Eq. (11 Dick.) 63), was briefly as follows: Jansen and others were members of Germania Lodge, No. 50, of the Knights of Pythias, and became dissatisfied with some of the conduct of the grand lodge, and, being aware that any failure to obey and observe the laws of the grand lodge would result in a forfeiture to the grand lodge of all the funds of the inferior lodge, amounting to hundreds of dollars, deliberately set to work and, in defiance of an interlocutory order of this court, distributed the money among themselves. The result was that later

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on a final remedial decree was made against all of them who actively engaged in the scheme, and they were directed to pay the money to the grand lodge.

Failing so to do, proceedings in attachment were taken against them on two grounds—*first*, for punitive purposes, in disobeying the interim restraining order of the court; *second*, remedial to the grand lodge for not paying over the money in obedience to the final decree. The real basis of the final decree was the wrong appropriation of the money in their hands after they had been enjoined by this court. On those contempt proceedings Jansen and others were adjudged guilty of contempt and committed to the custody of the sheriff. An appeal was taken from that order. The matter was argued both above and below by able counsel. Neither in the court below nor on appeal was the point taken that proceedings against the body were not proper or lawful, but the order below was reversed on the single ground that it appeared by the affidavits already in the case that the defendants were unable to pay the money, and therefore the imprisonment should not be imposed.

I will advise an order in accordance with these views.

THE STANDARD OIL COMPANY

v.

ROBERT BUCHI et ux.

[Submitted April 4th, 1907. Decided April 17th, 1907.]

1. A deed whereby, for a cash consideration named and the payment of damages to be ascertained by disinterested persons on oath, one grants the right to lay pipes for the transportation of petroleum, together with all the rights and privileges necessary to the enjoyment of the grant and the removal of the pipes, the pipes to be laid within ten feet of the line of the grantor's property, does not convey a mere easement in gross, nor a license which may be revoked at the will of the grantor, and it is not revoked by its assignment to a third person.

2 Buch.Standard Oil Co. v. Buchi.

2. Under a grant of right to lay pipes in land to convey petroleum, the exercise of the right by the laying of a single pipe and later of a second pipe does not define the extent of the easement so as to prevent the laying of a third pipe.

3. Under a grant of right to lay pipes in land to convey petroleum, the mere lapse of time does not affect the right of the grantee to lay additional pipes.

On order to show cause why an injunction should not issue.
Heard on bill and affidavits.

Mr. Gilbert Collins, for the complainant.

Mr. J. Emil Walscheid, for the defendants.

PITNEY, ADVISORY MASTER.

The object of the bill is to obtain judicial restraint preventing the defendants from interfering, by strong hand and serious threats of violence, with the complainant's work in laying across the lands of the defendant in Bergen county a line of pipe for the transportation of oil.

At and just before the filing of the bill the complainant had placed on the premises of the defendant a number of joints of pipe, and had leaded them together, ready to be buried beneath the earth, and its workmen were about to excavate a trench for that purpose when they were driven from the premises by threats of the defendant's daughter to shoot them, accompanied with the actual presentation of a pistol.

The complainant claims the right in question by virtue of a deed dated the 30th day of October, 1882, and duly recorded on the 6th day of December, 1882, in the clerk's office of Bergen county, where the lands lie, between James H. Kingsland, predecessor in title of the defendant and then the owner of the lands in question, and one John B. Barbour, under whom the complainant claims.

That deed, or so much of it as is necessary for present purposes, is as follows:

"Witnesseth, That for and in consideration of five dollars, in hand paid, the receipt of which is hereby acknowledged, and the further sum of twenty dollars, to be paid before any pipe is laid, the party of the first

part, his heirs and assigns, hereby grants to the party of the second part, his heirs and assigns, the right of way to lay pipes for the transportation of petroleum, and operate the same on, over and through his lands, in said county of Bergen, in said State of New Jersey, described in a certain deed dated September 13th, 1881, and recorded in the county clerk's office of Bergen county, in Book Z-10, page 542, of Deeds, together with all the rights and privileges incident and necessary to the enjoyment of this grant and the removal of said pipes.

"In further consideration of said grant and demise, the party of the second part hereby agrees to bury the said pipes a sufficient depth so as not to interfere with the cultivation of the soil, at least three feet, and to pay any and all damages which may arise from the laying, maintaining or operating of said pipe lines, said damages, if not mutually agreed upon, to be ascertained and determined by three disinterested persons, on oath, one thereof to be appointed by the party of the first part, his heirs and assigns, one by the party of the second part, his heirs and assigns, and the third by the two so appointed as aforesaid, and the award of such three persons shall be final and conclusive.

"It is understood and agreed between the parties hereto that said pipe lines are to be laid within ten feet of the southerly lines of the above-described property, excepting where there are angles in said property lines, at which points such deflections shall be made therefrom as the surveyor of the party of the second part may decide to be necessary.

"Witness our hands and seals the day and year first above written.

"(Signed) JAS. H. KINGSLAND. [L. S.]

"(Signed) J. B. BARBOUR." [L. S.]

The bill alleges, and in this respect is supported by the affidavits, or at least is not disputed on this motion, that the grantee, Barbour, was a mere agent or trustee for procuring the right of way (and land for pumping stations) for a continuous underground series of pipes conducting petroleum from Pennsylvania and other oil-bearing regions to tidewater; that in 1880 he purchased certain land in Bergen county from a Mrs. Zabriskie, and an adjoining tract from one Knowles, for the purpose of a pumping station, which he immediately conveyed to the Standard Oil Company, and that the deed above mentioned from Kingsland was also taken by said Barbour as a part of the right of way for a great pipe-line system for conducting oil from the oil regions to tidewater, and shortly afterwards was assigned and conveyed to the complainant, and a continuous line of oil-bearing pipe was laid over it, including the Kingsland strip, and pumping stations erected, and the pipe line put in use for the purpose of conveying oil, and has been in use ever since.

That later on, in 1894, a second pipe line was laid alongside

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the first along the entire length of the Kingsland property and put in immediate use, and that the object of the present proposed interference with the soil of the defendant is to lay a third pipe line over the whole right of way, close beside the first.

The justification set up by the defendant amounts to a demurrer to the bill, and the argument in its support may be briefly stated as follows: That the grant contained in the Kingsland deed amounted to no more than the grant of an easement without the naming of any dominant tenement, and therefore amounted to no more than an easement in gross, which was not assignable, and hence amounted to a mere license, and was determinable at the will of the licensor; that the license was in law immediately abandoned by the assignment thereof, and that it was also formally determined by a notice of revocation given by the defendant Buchi to the complainant, dated March 5th, 1907, and annexed to the bill of complaint.

The first inquiry naturally is, what is the true character of the grant in question?

Is it properly classified either as a true and simple easement or as a mere revocable license, or is it something more than either?

It is to be observed, in the first place, that it is an instrument under seal and expresses to be for a valuable consideration presently paid, with the provision for the ascertainment of a further consideration in a mode, the reasonableness of which seems to me to be quite apparent and which has not been attacked in the argument.

In the next place, it is not a mere promise to do something in the future, nor is it a mere permission, but it is a grant *in presenti*, and it is not a mere privilege given to the grantee which can be considered as merely personal to him, such as a privilege to wander over ground with or without the privilege of hunting or fishing, but it is made to the grantee, his heirs and assigns.

Then it is not the mere privilege to walk or pass over land without the right to disturb the soil, as is a right of way, but it is a "right to lay down pipes for the transportation of petroleum and to operate the same over" the lands, "together with all the right and privileges incident and necessary to the enjoyment of

the grant and the removal of the pipes." This grants rights in the soil *in perpetuo*.

Now, just here the defendant attempts to meet this aspect of the case by setting up that he does not propose to dispute or disturb what has already been done under the so-called license, or to interfere with the complainant in the enjoyment of its works already on his land, but he claims the right to prevent any further exercise of the rights mentioned in the grant. Nor does he contend that the right to lay the third line of pipes is not included in the terms of the grant. Nor does he contend that there is anything inequitable in the complainant's standing before the court. On the contrary, he puts himself on the bold, bare ground that because there was no dominant tenement mentioned in the grant to which what would have been an easement was appurtenant or appendant, the easement, so called, became one in gross and not assignable, and by its attempted assignment ceased to exist in law, or at least degenerated into a mere license, revocable so far as not acted upon.

Now, is it possible to treat the document in question as having no greater force than that? The doctrine contended for, if logically applied, leads to this result: If Mr. Barbour had paid Mr. Kingsland \$1,000 in cash for this grant, and had the next day assigned it to the complainant, it would have been possible for Kingsland to have immediately destroyed the value in the law of his grant by a formal revocation of it, and the complainant would have had no relief in equity by showing that Barbour was acting merely as its agent, for it is not contended by the defendant that the Standard Oil Company has not the capacity in law of holding the title to and operating a pipe line such as that described and in actual use. And it is to be observed that the question is not whether, in the then present condition of the law, the Standard Oil Company had the right to acquire by condemnation proceedings the lands and rights of way for its pipe line and pumping stations from the western oil fields to tidewater, but the question is whether, having first purchased the lands and rights of way through agents, by means of divers conveyances which did not disclose, so far as relates to mere rights of way, any termini or dominant tenement, it could have been prevented by any one of

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the grantors from proceeding to lay its pipe across the grantor's land. Or rather, whether, having acquired title in that manner, by grants which provided in effect the right to add to its pipe line from time to time, and having acted upon those grants so obtained, and having built a great trunk line and being in possession and use thereof, it may be prevented from adding thereto on the ground here taken.

The question is a serious one and has received my careful consideration, aided by elaborate arguments by counsel.

It is serious because it is quite notorious that it has been a common practice in starting great enterprises of this character, to acquire necessary rights in the manner here adopted.

Now, to return again to the grant itself. In addition to the characteristics already noticed it is to be remarked that the object of the grant is mentioned, namely, the transportation of petroleum. Now, it was then common knowledge that petroleum was produced mainly, if not entirely, in Western Pennsylvania and regions to the west of that locality, hundreds of miles from the *locus in quo*, and that its principal place of preparation, by refinement for market and distribution, was in or near the city of New York. Now, it seems to me that under these conditions the grantor and his assigns are chargeable with notice, from the very language of the grant, that this line of pipes was to extend from the various sources of the crude petroleum to tidewater, and that, from the very nature of the case, it was not a mere easement which granted to a dominant tenement a right or privilege in a servient tenement. And I think, further, that the grantor could not have supposed that the grantee, Barbour, expected himself, personally, to exercise the right granted, but that it would be transferred to some corporation for exercise in connection with many other like grants, the whole creating a long through route from the oil regions to tidewater.

Now, with these preliminary remarks, is it possible to conceive that the idea of an easement requiring a dominant tenement could have been in the minds of the parties, and further, is it possible that the grant could be construed to be one involving a dominant tenement to which it was appurtenant?

The idea underlying the ordinary easement is that it is at the

expense of one tenement, called the servient tenement, and for the benefit especially of another tenement, called the dominant tenement. Clearly the right granted by the deed in this case was not of that character, and hence it must be construed by rules not applicable to those of ordinary easements. There was in this case and could in the nature of things be no dominant tenement.

Nor is it, in its essential nature, a license, nor can it be reduced in its nature in that respect. It by its terms granted a permanent right to lay the pipe, to maintain the same and to remove the same. It gave an interest in the land quite as positive and as permanent as that in which a deed is given granting the right to lay a line of water pipes or to erect a line of telephone poles across the grantor's land, where the circumstances indicate that the work done thereunder was to be permanent.

From these considerations, based on general and familiar principles, I come to the conclusion that the defendant's position is untenable, especially when urged in a court of equity.

Let us now consider some of the authorities cited by the learned counsel for the defendants.

Among the first of those is the famous case of *Ackroyd v. Smith*, 10 C. B. (1 Scott) 164. That was the case of the conveyance of a piece of land with a right of way over other lands of the grantor to the land conveyed, with the addition of the words "for all purposes," and it was held that an assignee or grantee of the land so conveyed could not justify under the grant unless he showed that the act done under it would be justifiable without the words "for all purposes." That was in effect holding that a right of way in gross was not assignable. It was a case of pure easement of way, which gave no interest in the soil itself.

It is proper to remark here that the doctrine so established has been confined generally to cases of pure easements. See *Goodrich v. Burbank*, 12 Allen 459, and see, per Justice Earl, in *Mayor, &c., of New York v. Law*, 125 N. Y. 380 (at p. 392), where he says: "It is quite true that easements must generally be appurtenant to some land or estate, and that there must be a dominant estate to which the easement appertains and a servient

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estate upon which it is imposed. But that is not true of all easements. There may be easements in gross which are not appurtenant to any land, and which the owner may enjoy, although he does not own or possess a dominant estate, or any land whatever. Here the intention was to create an interest in this wharf by this grant which the grantee could enjoy himself or convey to any other persons."

The next case cited by counsel is *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. (5 Stew.) 248. That was the case of a license or privilege, under seal, given by the owner of certain lands to one Rude, whereby the owner agreed with Rude, his executors, administrators and assigns, that he and they should have the exclusive right and privilege of raising and removing ore from certain lands belonging to the owner, with the privilege of entering upon them for the purpose of raising and removing ore and erecting buildings, &c. Rude, as the only consideration, agreed to pay the owner twenty-five cents per ton for all ore removed. This paper was executed in 1857, and all that was done under it was to dig a hole deep enough to show the existence of the vein of ore. It was then abandoned by Rude and his assigns. The original owner, who gave the instrument, passed the title to his son, who made a new grant or license to a new party, who entered and worked the mine. It was held by Vice-Chancellor Van Fleet that it was a mere license, and not a grant, and that it was not a lease, citing numerous well-considered authorities. Moreover (and this is the principal ground of his decision), he held that the instrument plainly showed that the licensee was bound to enter within a reasonable time and prosecute the work, so that the owner would receive the consideration; that he could not stand by, like a dog in a manger, and do nothing, and thereby disappoint the owner of the land in what was his reasonable expectation, namely, to receive the royalty of twenty-five cents per ton of ore, as provided for in the instrument, and that his conduct in that respect amounted to an abandonment of his rights, whatever they were, under the instrument.

The next case cited by counsel is *Eckert v. Peters*, 55 N. J. Eq. (10 Dick.) 379. In that case one Green, being the owner of a sea-front tract of land of considerable extent, lying on the

easterly side of Ocean avenue in Monmouth county, and reaching from that avenue to the sea, and another separate tract on the west side of Ocean avenue, granted the tract on the west side, which was capable of being divided into several tracts, to a grantee,

"together with the free use and full rights of sufficient land on my sea front for bathing purposes, with the right to erect thereon bath-houses, and use the same free of charge, undisturbed, at any time."

It was held that while that grant gave the right to future owners of the lands on the west side a right of way from the avenue over the land on the east side to the sea, yet that so much of the grant as gave the right to erect bath-houses and use the same free of charge was revoked by the death of the grantor and subsequent conveyance.

The learned vice-chancellor held that a strip forty feet wide, which had been set apart as a right of way to the shore, was ample for that purpose. He then comments upon the vagueness and uncertainty of the language referring to bath-houses and their use, the non-limitation in number and the failure to locate their place on the large tract fronting the sea, and then holds that the right to place and use the bath-houses was, under the authorities, a mere license, and sustains his judgment by abundant authority and sound reasoning. The case has no application here, where the location of the pipes and their object are clearly defined, and the permanent estate in the soil is given by clear and proper language. The difference between an oil-bearing pipe, laid in the ground, and a portable bath-house is quite manifest.

Another case relied upon by counsel is *Mitchell v. D'Olier*, 68 N. J. Law (39 Vr.) 375. The only effect of that decision is to hold that a conveyance of land bordering on a small lake, together with a right of boating on the lake for pleasure and amusement, and to fish therein for pleasure, and to cut ice therefrom for their own private domestic use, was, under the circumstances, a clear appurtenant to the land granted, although no words so expressly declaring were found in the deed, and that these rights passed without being mentioned as an appurtenant to the land so conveyed in a subsequent conveyance to a third party.

The court does, indeed, express its opinion that a private easement, accompanied with a *profit a prendre*, could not be held in gross, thus expressing a preference for the English rule rather than the rule held by some of the American states. Such expression was simply for the purpose of showing that the grant of the rights in the lake passed as an appurtenant to the land conveyed without any express declaration to that effect, and did not pass to the grantee as a personal right or in gross. At the same time the right of certain entities to hold the rights properly exercised by them without any dominant tenement is clearly recognized on p. 380. The court also points out that, according to the old English doctrine, a *profit a prendre* may be held in gross, and shows an error in that respect in the language used in the opinion in *Cobb v. Davenport*, 32 N. J. Law (3 Vr.) 369.

Another case cited by the defendant is *Wilkins v. Irvine*, 33 Ohio St. 138. That was a writ of error in an action at law to recover a balance due for the purchase-money of a tract of land agreed to be sold and conveyed by Irvine, the plaintiff, to Wilkins, the defendant below. The defence set up by Wilkins, by answer and cross-petition in equity, was that the land contracted to be conveyed was subject to an easement or encumbrance arising out of a grant in writing, but unsealed, and not recorded, given by certain previous owners of the land to the Cleveland Rolling Mill Company of a right to lay down across the land and permanently maintain a water pipe from the Cuyahoga river to the rolling mill's works for the purpose of carrying water to the works, and that the grant had been executed and the pipe laid and the defendant prayed a rescission of the contract. The answer to this defence was that the defendant, Wilkins, had no knowledge or notice of either the existence of the pipe or of the grant and therefore was able to hold the property free and clear of the easement. The defendant, by his counsel in argument, urged that he, Wilkins, should not be compelled to assist Irvine in practicing a fraud upon the rolling mill company. On the other hand, it was urged by counsel for Irvine that under the peculiar statutes of Ohio the license in that case, not being under seal and recorded, created no encumbrance, and the extreme ground was taken that although the former owners of the land

had, in the grant, used this plain language, "We hereby grant to said company the right to come upon said lands and so lay said pipes at a depth of not less than two feet and there permanently to maintain the same, with like privilege at any time for repairs, relaying or removing," yet that, although fully executed, for want of a seal it was a mere license and revocable.

The court held that under the statute, which it cites at length, an unsealed, unacknowledged paper like the one in question could create no encumbrance. It further held, under another section of the statute, that if unrecorded it must be deemed fraudulent as against any subsequent *bona fide* purchaser without notice. The court intimated no opinion on the question of an executed or non-executed license being revocable, but put their decision distinctly on the ground that the defendant had no right in equity to a rescission, because he was a *bona fide* purchaser without notice. The decision was by a majority of three against two of a court of five judges.

The result of the decision is simply to hold that a *bona fide* purchaser without notice of an encumbrance cannot set up that encumbrance in any court as a defence to a suit for purchase-money.

The defendant also cites the famous case of *Wood v. Leadbitter*, 13 Mees. & W. 845 (1844). This is the famous race-course ticket case, in which the plaintiff, after having purchased a ticket issued by the stewards of the Doncaster races, was ejected from the grounds, and the ticket was held to be a mere revocable license. The opinion of Baron Alderson is a carefully-prepared and luminous exposition of the law on the subject, so much so that it is quoted *in extenso* by Mr. Gale in the fourth edition (London, 1868) of his treatise on *Easements*, where will also be found many cases decided in England on the subject after *Wood v. Leadbitter*. It is cited by the defendant here to sustain the proposition that the fact that the license here in question is created by deed does not alter the situation. But an examination of the opinion in question shows that its character for revocability depends upon the construction of the instrument itself, and the whole of what the learned baron says on pp. 844,

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845 is most instructive, and by no means supports the contention of the defendant's counsel.

Wood v. Manley, 11 Ad. & E. 34, another case cited by defendant, not only has no bearing on the present question, but is against his general proposition. The headnote is this:

"Goods which were upon plaintiff's land were sold to the defendant. By the conditions of the sale, to which plaintiff was a party, the buyer was to be allowed to enter and take the goods.—*Held*, that after the sale plaintiff could not countermand the license."

Another case cited by defendant's counsel is *Berry v. Potter*, 52 N. J. Eq. (7 Dick.) 664. There a father said to his daughter and her husband that they might pick out, among several tracts of land, a certain tract as their share in his property and take present possession of it, and that he would make his will giving it to his daughter. The daughter and husband took possession, and the father afterwards became insane, and a guardian was appointed, who demanded possession of the premises. In the meantime the daughter and her husband had taken possession and worked certain clay banks. Vice-Chancellor Bird held that it was a mere parol license, and could not be set up in defence to the demand of the guardian for possession of the premises. There was there no written grant, and the case has no application here.

Finally, the defendant makes the point that the complainant, having once exercised its right of laying a single pipe, and again later a second pipe, all before the title became vested in the defendant, cannot now enlarge the burden of the easement by now adding a third pipe, and he relies upon the very recent decision of Vice-Chancellor Bergen in *Sked v. Pennington Spring Water Co.*, 65 Atl. Rep. 713, and he relies also upon the well-known cases of *Johnson v. Jaqui* and *Jaqui v. Johnson*, both in the court of errors and appeals, and reported in 27 N. J. Eq. (12 C. E. Gr.) at pp. 526 and 552, respectively.

The case of *Sked v. Pennington, &c., Co.* was this: Sked conveyed to the company the right to build a reservoir, not exceeding a half acre in extent, at what is called the "middle spring," and to convey the water away, but not designating by

metes and bounds, or in any other manner, the precise shape or location of said reservoir. The defendant entered and constructed the reservoir and abducted water, but did not include in the boundaries of the reservoir quite a half acre of land. Ten years later, having occasion to increase its supply, it entered on the premises and commenced to sink what is known as a driven well outside the limits of the reservoir, but so near it that, by a new line of circumference which should include the original reservoir and the *locus* of the driven well, no more than one-half an acre would be included, and the learned vice-chancellor enjoined such work. He did this upon the principle that, having once located their half acre, the defendant could not go outside of such location.

The distinction between that case and this is manifest. Here the limits of the original grant is clearly defined as being within ten feet of the southern boundary of the land.

That the mere lapse of time does not affect the complainant's right was held in the case of *Wheeler v. Wilder*, 61 N. H. 2.

That a grant may be made in advance to individuals in favor of a corporation afterwards to be organized seems to have been held in *Salem Capital Flour Mills Co. v. Stayton Water-ditch and Canal Co.*, 33 Fed. Rep. 146. The case is very lengthy but the part from which I draw my inference is found on p. 153.

I have examined a large number of cases bearing upon this question and agree with what Vice Chancellor Van Fleet said in *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. (5 Stew.) 248 (at p. 254), viz., that the adjudications upon this subject cannot be reconciled, and "if an attempt should be made to arrange them in harmonious groups I think some of them would be found to be so eccentric in their application to legal principles as well as in their logical deductions as to be impossible of classification."

Mr. Gale, in the edition of his work on *Easements*, previously cited (at p. 20 *et seq.*), attempts a list of those recognized up to the date of that edition. Among them I find none like the present.

I think the present grant is something more than an easement, although undoubtedly it includes easements, and I think that it is a great deal more than a license, in that it gives an irrevocable

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interest in the land and creates, by apt words, an estate; is expressed to be upon a consideration and is sealed by the seal of the grantor.

I can find no authority in any of the treatises or in any of the adjudged cases for holding that it is revocable.

As in my judgment the right of the complainant is entirely clear and not subject to revocation I think it is entitled to relief by way of immediate injunction.

But I think that such relief must be upon conditions contained in the grant which requires that the complainant enter into bonds to the defendant, to be approved by a special master, to pay such damages as may be ascertained in the manner expressed in the deed above recited.

JANE ELIZABETH GILLEN

v.

MARY ELIZA HADLEY et al.

[Decided May 15th, 1905.]

1. A complaint in a court of chancery by *cestui que trust* under a will alleged that defendants, as trustees under the will, had received money and property belonging to the estate and had never accounted therefor, and asked that they make a discovery of all property which had come into their possession as trustees, and that they be required to file an account showing all their transactions and a schedule of all property in their possession. Subsequently to filing of the bill, but prior to the service of subpoena on defendant trustees, they filed with the prerogative court an account purporting to show all their transactions as such trustees to several items of which exceptions were then pending, and these facts were pleaded to the action in chancery. It did not appear that any of the parties knew of the proceedings of the others prior to the service of the subpoena on defendants.—*Held*, that the jurisdiction of the chancery court had been properly invoked, and that the court would maintain jurisdiction, since it had first taken it.

2. In a suit in chancery, if a question arises as to the validity of a devise in a will, and the reading of the clause in question does not settle the matter, the court may hold the bill until an action at law is brought

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to establish the title, or it may refer the question to a court of law for an opinion thereon as provided by Chancery act of 1902, section 79. *P. L. 1902 p. 537.*

3. A bill in chancery by a *cestui que trust* under the will of a testator alleged that temporary annuities given by the will had ceased by the death and the attaining of majority of the beneficiaries thereof, and that all of the temporary purposes for which the trustees were directed by will to hold certain real estate had ceased and been determined, and that a certain devise in trust was void, because the ultimate disposition of the residue violated the rule against perpetuities, and that complainant was entitled to the same as an heir of testator, and, in addition to a general prayer, the bill asked that the executors give a full account of the estate and make discovery of their transactions as such, and as to what sum of money had been realized from the sale of real estate, and asked that the portion of the will attempting to create a perpetuity be declared null and void, and that the oratrix receive her share of the estate of the decedent.—*Held*, that the bill made a case within the jurisdiction of the court independent of the title to the real estate.

Heard on bill and combined plea and demurrer.

This is the second suit in this court between these parties.

It was commenced by bill filed on the 7th day of September, 1906.

The complainant is one of the children of Henry P. Simmons, late of the city of Passaic, and one of the *cestui que trusts* under his will.

The defendant Mary Eliza Hadley and her husband, Jacob F. Hadley, William Nelson and Colin R. Wise are the executors named in said will. Mrs. Hadley is one of the children of said testator, and she and her husband are named as the trustees under said will. Their duties and powers as such are distinct from their duties as executors.

The will of Mr. Simmons was dealt with by the court of errors and appeals in *Simmons v. Hadley*, 63 N. J. Law (34 Vr.) 227. Subsequently Mr. Nelson, the active executor, prepared and procured to be passed by the prerogative court an elaborate joint account of the dealings of the executors, which account was subsequently repudiated by Mrs. Hadley, as executrix, in a bill filed by her against Nelson, which resulted in this court adversely to Nelson, and to a setting aside and readjustment of the account, as between the executors, up to that date.

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The complainant herein was a party to that suit, and co-operated with her sister, Mrs. Hadley, in attacking the accounting in the prerogative court.

Henrietta Simmons, the plaintiff in *Simmons v. Hadley, supra*, is one of the defendants herein.

Mrs. Howe, the fourth daughter of the testator, and one of the beneficiaries under his will, died before the filing of the present bill, leaving no children, and testate of a will in favor of her husband, who, however, had predeceased her.

Mr. Sherrerd Depue, for the complainant.

Mr. Edwin G. Adams, for the defendants.

PITNEY, ADVISORY MASTER.

This is a suit by a *cestui que trust* against a trustee. The trust was created by a will, and the trustees had been in possession of the estate, real and personal, eight or more years before the bill was filed. The subject of the trust is at present both real and personal estate. The will gave and devised all of the testator's property, with certain exceptions, to the trustees in trust for the purposes of his will, with power of sale. That gift in trust, and the objects and purposes of the trust, are set forth in the tenth paragraph of his will and thirteen subdivisions of it. They are stated sufficiently for present purposes in *Simmons v. Hadley, supra*. The fifth paragraph of the bill alleges that Mrs. Hadley and her husband have, as trustees, from time to time collected and received moneys and other property belonging to the estate, the exact amount of which is unknown to the complainant, and have never accounted to the complainant or to any court respecting the same. The third paragraph of the prayer is that Mrs. Hadley and her husband may make discovery of all money, property, books and papers of every description which have come into their possession, or the possession of either of them, as trustees under the will, &c., and that said trustees may be required to file an account in this court showing all their transactions as such trustees, and what sum or sums of money have been received by them belonging to said estate, together

with a list or schedule of all the real estate or personal property now in their possession or claimed by them as trustees under said will.

After demurring to all the bill, except the fifth paragraph of the statement of the bill and the third paragraph of the prayer, above recited, the defendants, Mrs. Hadley and her husband, plead to the statement and prayer last mentioned

"that on the 13th day of September, 1906, they filed with the prerogative court an account showing all their transactions as such trustees, what sum or sums of money had been received by them belonging to the said estate and what payments from such moneys had been made by them in fulfilling their trust as trustees under the said will; that the register of said prerogative court duly audited and stated the said account, and that legal notice of the proposed settlement of said account was given, as appears by affidavits filed in said prerogative court; that one Henrietta Simmons, one of the defendants in this suit, filed exceptions to four items in said account, and that the ordinary, by an order made on the 16th day of October, 1906, referred said exceptions to a master of this court to take proofs thereon and report his conclusions to said prerogative court, and said exceptions have not yet been finally disposed of."

By comparing the plea with the prayer it will be observed that the plea is not so broad as is the prayer, which is based on other allegations in the bill besides that in the fifth clause.

It is further to be observed that the bill was filed in this court seven days before the account was filed in the prerogative court, and that the proceedings set up in the plea as being taken in the prerogative court upon the exceptions were taken on the 16th day of October, while the service of the subpoena upon Mrs. Hadley and her husband was acknowledged by their solicitor as of the 28th day of September previous thereto. There is nothing in the papers to show that the complainant had notice, at the time of the filing of her bill, that the defendants were preparing their account for the prerogative court; nor, on the other hand, to show that the defendants, when they filed their account, knew of the filing of the bill. It thus appears that the complainant had invoked, in a proper manner, the jurisdiction of this court to take cognizance of this accounting before the defendants had actually filed their account in the prerogative court.

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The jurisdiction of this court is undoubted, and the general rule is that if it first takes jurisdiction it will maintain it to the exclusion of the regular probate courts. On the other hand this court will not withdraw an accounting already pending and thereby interfere with the jurisdiction of either of the other courts after they have once entertained it, except for special reasons. But for special and sufficient reasons this court will arrest a proceeding in the prerogative court or the orphans court in a given case and assume exclusive jurisdiction.

In the present case I find reasons in the circumstances set forth in the bill for the conclusion that it is altogether better that the whole subject should be dealt with in this court, and I will therefore advise that the plea be overruled without prejudice to the defendants to set up the same matter by their answer.

The complainant is clearly entitled to that part of the prayer for discovery which is not covered by the plea.

There is no prayer in the bill for an injunction restraining proceedings in the prerogative court and no restraint of that character has been applied for.

We come now to the demurrer. For present purposes the statement of the contents of the will, found in the report of *Simmons v. Hadley, supra*, is sufficient.

The bill alleges that the temporary annuities given by the will to the daughter, Mrs. Howe, and to the granddaughter, Miss Gillen, mentioned in the opinion in *Simmons v. Hadley, supra*, have ceased by the death of Mrs. Howe and the arrival at the age of twenty-one years by Miss Gillen, and that all the temporary purposes for which the trustees were directed by the will to hold real estate has ceased and been determined. It was upon the continued existence of these temporary purposes that the case of *Simmons v. Hadley, supra*, was decided in favor of the defendant by the court of errors and appeals and the bill alleges that the original defect in the devise revives, and that the devise is void because the ultimate disposition of the residue violates the rule against perpetuities in that it extends the ultimate division of the property to a period more than twenty-one years beyond the life of a person in being, and that the complainant, as an heir-at-law of her father and of her sister, Mrs. Howe, is entitled to the

same; and it prays, in addition to the general prayer for answer without oath, that the four executors may give a full account of the estate and make discovery of all their transactions as executors and what sums of money have been realized from the proceeds of the estate or from the proceeds of the sale of any of the real estate. This prayer is not covered by the plea.

The fourth prayer is:

"that so much of the will as creates or attempts to create a trust under the tenth paragraph of the will (in which the offensive provision is contained) may be declared to be null and void and as of no effect as a testamentary gift, bequest or devise of the property therein referred to, and that your oratrix may receive her share of said real and personal estate of decedent."

The fifth prayer is that the defendants Hadley may be restrained from making any farther sales of real estate under the power given to them or from giving any deed for the purpose of confirming such sales and for other relief.

To this part of the bill the defendants demur generally for want of equity.

The ground of demurrer is thus stated in the written argument of the defendants. "An heir-at-law who claims a mere legal estate in real property, when there is no trust, is not allowed to come into a court of equity for the mere purpose of obtaining a mere construction of the provisions of the will."

And in anticipation of the claim on the part of the complainant that the trustees have already converted a part of the real estate into money the brief contains this further point: "Upon the principles of equitable conversion the proceeds of the sale of real estate by the trustees are to be regarded as real and not personal property for the purposes of this bill."

The theory of the counsel for the defendants seems to be that complainant must first establish at law their title to the property and cannot use this court directly or indirectly for that purpose.

But the leading case which they cite (*Bowers v. Smith*, 10 *Paige* 193) contains this clear statement by Chancellor Walworth on the part of the court: "So also, if the real estate of the testator

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is devised to a trustee upon distinct and independent trusts, some of which trusts are valid and others invalid, there is a resulting trust in favor of the heir-at-law as to so much of the property as is not legally and effectually disposed of by the will, where the interest of each is not turned into a legal estate by the provisions of the revised statutes. The *cestui que trust* in such cases, also, may file a bill in this court to have his rights as *cestui que trust* settled and ascertained, and to have the trusts of the will carried into effect so far as they are valid and effectual. And where there is a mixed trust of real and personal estate it frequently becomes necessary for the court to settle questions as to the validity and effect of contingent limitations, in a will, to persons who are not *in esse*, in order to make a final decree in the suit, and to give the proper instructions and directions to the executors and trustees in relation to the execution of their trust. (Citing authorities.) But I am not aware of any case in which an heir-at-law of a testator, or a devisee, who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will."

And that definition or delineation of the jurisdiction of the court covers this very case.

The question is whether the complainant has an adequate remedy at law.

The bill is not filed avowedly for the construction of the will. Its object is to prevent further dealing, by these trustees, with the real estate in question, and a recovery from them of the estate now in their hands.

The necessity for preventing further sales and recovering what had already been sold is the ground of the action so far as demurred to.

The case of *Torrey v. Torrey*, 55 N. J. Eq. (10 Dick.) 410, was the case of a woman who filed a bill against her own children, claiming that by the true construction of her husband's will she was the absolute owner in fee-simple of all his property, including certain lands, and asking the court to make a decree to that effect against her own children, infants, and the court refused. *Fahy v. Fahy*, 58 N. J. Eq. (13 Dick.) 210, is precisely the same case

as *Torrey v. Torrey*, *supra*. *Palmer v. Sinnickson*, 59 N. J. Eq. (14 Dick.) 530, was a bill in form to quiet title, but lacked all the elements of jurisdiction for that purpose. The complainants desired the opinion of the court in the construction of a will for the purpose of establishing their title to a sum of money lying in a bank. The demurrer was naturally and necessarily sustained.

In *Hoagland v. Cooper*, 65 N. J. Eq. (20 Dick.) 407, the chancellor, in an elaborate opinion, goes over the whole ground. There were in that case several specific questions submitted involving the construction of several parts of the will. He says: "The court of chancery, when called upon to exercise its judicial functions in determining whether the relief sought by a suitor should be granted, and when the question whether such relief should be granted involves the construction of a will, has undoubted power and its duty is to construe the will. The peculiar jurisdiction of this court over trusts and over those charged with trusts frequently requires it, upon the instance of such trustees or those interested, to give directions for the conduct of such trustees in the administration of the trust, and when the trust is created by will, incidentally, the exercise of this jurisdiction to direct involves the construction of the will. Mr. Pomeroy, indeed, declares that the doctrine in harmony with principle and sustained by the weight of authority in this country is that the special equitable jurisdiction to construe wills is a mere incident of the general jurisdiction over trusts, and that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will without any further relief."

The learned chancellor then cites all the New Jersey authorities. As examples of the proper exercise of the power, he cites *Benham v. Hendrickson*, 32 N. J. Eq. (5 Stew.) 441, and *Dusenberry v. Johnson*, 59 N. J. Eq. (14 Dick.) 336. The chancellor then sought, in the case before him, for ground for the exercise of jurisdiction by the court, and found one such matter, and examined carefully and construed the will as to it, and finally decided against the complainant, who was a substituted administrator, and held that the relief ought not to be granted because it would be inequitable to do so. He then proceeds, in the latter part of his opinion, to deal with a request made of the court in

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that cause to declare its opinion as to the effect of the will upon the real estate of the testator, of which the testator died seized. This he declined to do and added: "In the absence of some specific equitable relief which this court can give, it would be impertinent for it to express an opinion which would not be binding upon a court of law in an action of ejectment and which could not be enforced by any decree of the court."

There was in that case no relief asked for as to the real estate as to the title to which under the will the bill asked the opinion of the court.

A still more recent case, decided in 1906, is *Goetz v. Sickel*, 71 N. J. Eq. (1 Buch.) 317, decided by Chancellor Magie. There the bill was filed by the executors, who took the real estate in trust, and under the directions of the will they were collecting rents of a house and paying them to the widow and two daughters, and the bill stated that those daughters were claiming that the executors had no right to hold the property and collect the rents, contending that the devise in question was wholly void because in contravention of the rule against perpetuities. The prayer was for a decree that the trusts may be performed and carried into execution and that all necessary directions may be given for that purpose, and a prayer for further relief. The children and all persons living and having an interest under the will were made parties. The jurisdiction was put upon the ground that the trustees were entitled to the direction of the court. The chancellor held, with reluctance, that he had no authority to grant such a decree, saying that it was plain that what complainants sought is not a direction as to the performance of their duties as trustees, but to discover whether they are in fact trustees and therefore charged with any duties as such, from which it follows that they were seeking to induce the court to decide the question of the title to land, and dismissed the bill.

The difference between that case and this is that here a devisee, who is also an heir-at-law, is seeking not only the proceeds of sale of the land already made by the trustees, to which she is not entitled if there was a valid devise of the land to the trustees, but also to prevent a further execution of the power of sale. And if the complainant's contention that the devise is void for the reason

stated, then it is eminently proper that the bill should be retained and the relief granted.

Turning to the bill itself we find that it states and charges distinctly that the devise is void, and gives the language in the will which it alleges creates the perpetuity. Now, it is possible that the bare reading of that clause in connection with the well-settled rules of law would leave the matter not open to doubt, and the court may find itself unembarrassed by any question in that respect. In short there may be no question to solve. But if the court finds itself embarrassed there remains two modes for the relief thereof.

In the first place, the court may do as it does in cases where the title to land is questioned in a suit for partition. It may hold the bill until an action at law is brought to establish the title, or, in the second place, it may refer the question to a court of law for an opinion thereon under the seventy-ninth section of the Chancery act of 1902.

Upon the whole case, then, considering that the bill makes a case clearly within the jurisdiction of the court, quite independent of the title of the real estate, and that it is possible that the court will not be embarrassed with any doubt as to title when it comes to the hearing of the cause, and further, that this is an action by the *cestui que trust* against the trustee, and that if, in the course of it, any embarrassment does arise out of a doubt as to the title to land set up by the complainant, the court will find no difficulty in procuring that doubt to be settled by a court of law, I am of the opinion that the demurrer should be overruled, and will so advise.

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JAMES B. DUKE

v.

LILIAN N. DUKE and FRANK T. HUNTOON.

[Decided May 3d, 1906.]

1. On a husband's petition for divorce, evidence *held* to establish adultery on the part of the wife with the party charged as co-respondent.

2. In such case, where the party charged as co-respondent intervenes as provided under the Divorce act (*Rev. 1902; P. L. 1902 p. 506 § 14*), he is liable to the husband for the payment of his costs and counsel fees incurred in prosecuting the suit.

On petition for divorce on the ground of adultery charged with Frank T. Huntoon, who appeared under the statute and was made a defendant. Final hearing on petition, answer and proofs.

For previous proceedings in this case, see *Duke v. Duke*, 70 *N. J. Eq.* (4 *Robb.*) 135, 149.

This cause was heard on the 23d, 26th and 27th of April, and on the 2d and 3d of May, 1906, and a judgment at once pronounced in favor of the petitioner and against the defendant, and on the 4th of May a decree was advised accordingly.

Mr. Richard V. Lindabury, *Mr. Alvah A. Clark*, and *Mr. Junius Parker* and *Mr. W. W. Fuller* (both of the New York bar), for the petitioner.

Mr. Samuel Kalisch and *Mr. Chauncey G. Parker*, for the defendant Lilian Duke.

Mr. Alan H. Strong, for Mr. Huntoon.

PITNEY, V. C.

An appeal having been taken, I am asked to give my reasons for that decree for use on the hearing of the appeal.

To this end I will give a short history of the cause itself.

The petition was verified by the petitioner on the 31st day of August, 1905, and was filed on the 2d day of September, and a copy served on that day on the defendant at her residence in the city of New York.

Shortly afterward she moved to have the service set aside on the ground that the court could acquire no jurisdiction of her by extraterritorial service, because her husband was not a resident of the State of New Jersey.

That motion was disposed of against the petitioner, and on the 2d of November, 1905, she filed a plea to the jurisdiction, which plea, after hearing, was overruled on December 22d, as reported in 70 *N. J. Eq. (4 Robb.)* 135. A motion to stay the proceedings pending an appeal from that order was also overruled, as reported in 70 *N. J. Eq. (4 Robb.)* 149, and that action by this court was sustained by the court of errors and appeals.

On the 19th day of January, 1906, an answer was filed by Mrs. Duke, denying the adultery charged in the petition, and combining therewith a cross-petition against the petitioner charging him with adultery with certain persons named.

This cross-petition was answered by Mr. Duke on the 26th of January.

In the meantime Mr. Huntoon, the co-respondent named in the original petition, applied on the 26th day of October, 1905, and obtained an order to intervene as defendant, under the fourteenth section of the act concerning divorces. *P. L. 1902 p. 502* (at *p. 506*).

In March, 1906, application was made by Mrs. Duke, by petition, for an order against her husband for a counsel fee, and to her petition in that behalf the husband filed an elaborate verified answer, which was afterwards, at the final hearing, put in evidence against him by his wife and the co-respondent.

The cause was set down for hearing on the 23d, 26th and 27th of April, and the 2d, 3d and 4th of May, giving the defendants

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ample time to prepare their defense after the complainant's case was made.

On the 23d of April all the parties appeared with their counsel, and the taking of testimony was proceeded with all that day, and was then adjourned over to the 26th.

At the opening of the court on that day neither of the parties defendant appeared in person. No reason was ever offered why Mr. Huntoon did not appear, nor was any postponement asked by reason of his absence. Counsel for Mrs. Duke stated, and offered to prove, that she was confined to her house by illness, and asked for a postponement on that account. In my discretion I declined to postpone, and directed the taking of testimony to proceed on the part of the petitioner, but did not compel the defendant to cross-examine in the absence of the defendants until they should have an opportunity to confer with her, or it should appear that she was able to appear in court.

By consent of all the counsel I instructed a competent physician to visit Mrs. Duke, ascertain her physical condition, and report it to the court. This was done, and the physician next morning, April 27th, reported, under oath, that he found her somewhat indisposed, but had no doubt that she was entirely able to attend court on that day. Neither she nor Mr. Huntoon, so far as I could observe, appeared further in person, and neither was offered as a witness.

The taking of testimony proceeded on the days named until the afternoon of May 3d, when, as before stated, I at once pronounced in favor of a decree for the petitioner, and advised a decree against the defendant Huntoon for costs and counsel fees.

This latter was done in accordance with a practice which I understood to have the sanction of the chancellor, and seems to me according to reason, and I believe is according to the English practice. The defence was conducted jointly and in concert by both of the defendants, so that in proving a case against the female defendant the petitioner also proved it against the co-respondent. There was no allegation of a marital offence committed with any other person. The cross-petition was abandoned.

The defendant Huntoon claimed at the hearing the benefit of

the position of a full defendant, and on his objection certain depositions taken in North Carolina were, after full argument, excluded because he did not have notice of their taking. The order for costs against him carefully excluded the costs of the hearing on the plea to the jurisdiction.

Coming now to the merits of the case, the following historical facts appear:

[Here follows an examination of the evidence, concluding with a finding of the defendants guilty, omitted by the consent of the vice-chancellor.]

[The remainder of the opinion is a transcript of the stenographer's notes.]

One other matter which was disposed of by me at the beginning of the defendant's case may be mentioned here. I have stated that the defendant Huntoon applied for leave to intervene in October, and prior to the filing of the plea to the jurisdiction of the court. Mr. Huntoon had no notice of the trial of that issue, and before any production of evidence on the part of the defence on the final hearing on the merits, his counsel, Mr. Strong, moved the court, on behalf of Mr. Huntoon, to dismiss the petition on the ground "that the court has no jurisdiction to entertain it," because the complainant had offered no proof of the residence of either of the parties in the State of New Jersey, and there was no proof and the case did not show service of process within this state. And he argued that Huntoon had the right to set up in his defence that the court had no jurisdiction of Mrs. Duke, and that he (Huntoon) was not bound by the finding of this court upon the issue raised by the plea of want of jurisdiction.

Now, previous to the recent revised Divorce act a party charged as a *particeps criminis* in a suit for divorce based on adultery had no means of defending himself or herself against the charge of adultery, and a perfectly innocent man or woman might be wrongfully subjected to a *quasi* conviction of that offence without any opportunity to be heard. In fact, by perjured evidence, offered in an undefended case, such conviction might be, and probably was, often pronounced. The suit for divorce might have been collusive, and the procurement of the

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divorce might in reality have been by consent. Now, this state of things was liable to work, and in many instances did work, an injustice against innocent persons. Now, the object of the statute was manifestly and notoriously to remedy that wrong. Hence the new section introduced into the statute, as follows:

"In actions for divorce, because of adultery, it shall be lawful for the chancellor, in his discretion, at any time before final decree, to allow any person charged in the pleading with committing adultery with either of the parties in the suit to intervene for the purpose of defending himself or herself against the charge so made."

Now, here it is quite manifest that the purpose for which the defendant may intervene is limited to the defense against the charge. It seems to me quite clear that the intervenor has no right to challenge the jurisdiction of the court over the person of the real defendant. Besides, by intervening generally, as the defendant did in this case, without any protest as to the jurisdiction, he appeared generally and submitted himself to the jurisdiction of the court. And that intervention was made before the plea of the jurisdiction was interposed. Although he did not have notice of the trial of that plea, he is presumed to have kept a general watch on the progress of the cause, and if he had any desire or intention to question the jurisdiction of the court he might have added to his extremely short pleading a plea of that kind. I was unable, after hearing the very ingenious argument of Mr. Strong, to see the least merit in it, and subsequent reflection has not changed my view.

Mr. Lindabury—Now, if your honor please, we ask for judgment for costs against the co-respondent Huntoon.

The Court—I have already had occasion to examine that question, and by the advice of the chancellor, after submitting the matter to him, I gave judgment in a case similar to this for costs and counsel fee against the co-respondent, hence you are entitled to that judgment. It will not include, however, the cost of the proceedings to test the jurisdiction of this court. You will have costs against the co-respondent from the time he intervened, but not the costs of that issue of jurisdiction.

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Mr. Lindabury—No, your honor; preparation of this case, trial of this case, which he did make by voluntarily coming into it.

The Court—In the case in mind a man came in afterward, and I gave the whole costs against him.

Mr. Strong—Does your honor care to hear from Mr. Huntoon's counsel.

The Court—I only tell you what I did after consultation with the chancellor. I will give you the name of that case now if you wish it.

Mr. Lindabury—I can see no reason why Mr. Huntoon should not pay all the costs made in the preparation of and trial of this issue. As one of my associates says, it is a saying in the South that "two dance in company, but one must pay the fiddler alone," and it would seem highly proper that Mr. Huntoon should occupy that situation. He is a man of very large income, great wealth, I am told, and he has put us——

The Court—That don't make any difference.

Mr. Lindabury—No, but he has helped to put us to great expense. We have been required, as your honor will remember, to pay the defendant, his co-partner in this defence and the circumstances that led to it, \$3,000.

The Court—I don't consider anything of that kind. I don't take that into consideration here, except as measuring the importance of the cause.

Mr. Lindabury—You are making an allowance to the petitioner in this case on account of the costs and on account of the counsel fees which he has incurred, and it strikes me that it is a matter that may be taken into account that the petitioner has been compelled to disburse that sum as one of the items of the prosecution of the cause, and one for which the defendant Huntoon is responsible. I ask that your honor allow us judgment against Huntoon for the taxable costs of the cause and for a counsel fee commensurate with the importance of the case.

The Court—Will you please mention the amount of counsel fee you think you ought to have?

Mr. Strong—Your honor understands me, of course, as insisting that no order should be made against Mr. Huntoon.

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Mr. Lindabury—We think the allowance of counsel fee should not be less than \$5,000.

Mr. Strong—It seems to me that the figure suggested is absurd, in the first place; but I started to say before, there is no authority in the court, by statute or otherwise, that I know of, to make any order whatever for the expenses of the suit, counsel fees or otherwise, against Mr. Huntoon, if it were a matter of discretion, nor has Mr. Huntoon in any way enhanced the costs of this suit. I desire to direct your honor's attention to that point. He has not appeared here and offered independently testimony such as to increase the burden of the petitioner's case. The proof which the petitioner has made in this case he was obliged to make if Mr. Huntoon had not appeared, and under such circumstances, where the appearance of the co-respondent has not aggravated the expense to the complainant, there seems to be no reason for the exercise of a discretion, if the court had a discretion, to impose upon the co-respondent any of the expenses which he would otherwise have incurred, would otherwise have incurred necessarily.

The Court—I think that when a man makes himself a defendant, under the statute he becomes liable for the petitioner's costs, and also for counsel fees. I think I will take into consideration the fact that the defendants did not go very far with their defence, Mr. Lindabury, not far enough to trouble you much.

Mr. Lindabury—They made us believe they were going to, and we prepared to meet it.

Mr. Strong—Gave you an awful scare, didn't we?

The Court—Well, I don't see how I can give less than I did to the other side earlier in the proceedings, but I think that is enough, Mr. Lindabury, \$3,000. I will advise a counsel fee of \$3,000, and the costs of the issue. If you waive the costs of the issue on the jurisdiction, if you omit it entirely, the whole thing will go against both defendants, but if you put those costs in, they can only go against the female defendant. However, you can frame your decree to suit yourself on that hereafter.

Mr. Lindabury—I ask that the costs of supplying copies of the testimony to both parties in the cause be included in the taxed costs.

The Court—The rule, as I recollect about that, is this: You see, the stenographer looks out for his pay from the parties who employ him, except as to one copy for the court, and you are entitled to recover one copy, supplied to your side, costs of one copy, and if you pay the whole of the court's copy, why, then you are entitled to recover for two copies, and the bill may be made out to you, Mr. Lindabury, just made out to Lindabury, Depue & Faulks, cost of one copy for counsel and cost of another copy for the court. Then all I do is to write across it "tax it in."

Mr. Lindabury—We have gotten three copies, and one has been furnished to the other side.

The Court—They must pay that. I have nothing to do with that. The stenographer looks to them for that, and looks to you for what he has furnished to you, but the court is entitled to one copy, and the rule is that each party must pay one-half of the copy furnished to the court, but if that one-half each in point of fact is not paid, and the successful party chooses to pay the whole of the court's copy, he may include that in his costs. You are not obliged to pay but one-half of that, and the stenographer may call on the counsel for the defendant to pay the half, but I suppose they would prefer that it be taxed in the petitioner's costs, but you are not obliged to do that. If you choose to do that, Mr. Lindabury, you can have both copies taxed in the costs of the complainant, but you are not obliged to do it. You are obliged to pay one-half, and you are entitled to have that one-half put in the bill of costs. If you think you cannot recover it, you don't want to take that plan. Perhaps you better take the half and let the counsel for the defendant pay their half.

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WILLIAM R. WILSON

v.

GEORGE SEEBER and PHILLIP SCHAUBLE et al.

[Decided May 15th, 1907.]

1. In a proceeding by an attorney to obtain part of the proceeds of a compromise of a suit as compensation under a contract of retainer, evidence examined, and *held* to show that the contract was made.

2. Where an attorney contracted with his client that, as compensation for conducting the suit, he should receive one-third of the proceeds of the action, the contract gave him an equitable lien upon the proceeds when they took form.

On order to show cause. Heard on bill and affidavits, and answer and affidavits.

Mr. Alan H. Strong, for the complainant.

Mr. Edward M. Colie, for the defendants.

PITNEY, ADVISORY MASTER.

This is a contest over a part of a sum of money, which, at the time of the filing of the bill, December, 1906, was in the shape of a promissory note or notes given by the defendant Seeber to the defendant Schauble, and which notes were, I believe, in the hands of the defendant David.

At the filing of the bill an order to show cause, with *interim* restraint, was made thereon returnable in January, 1907. Later, on the 15th of January, by consent of all parties, the notes in question were paid under order of the court, and enough of the proceeds to cover complainant's claim were committed to the custody of the defendant David, to be held by him as trustee in an account in bank in his name as such trustee, and subject to the order of the court. That fund, now in immediate control

and custody of the court, was the proceeds of a compromise of a suit brought by bill in this court on September 1st, 1906, by Schauble against the defendant Seeber, in which the complainant herein, Mr. Wilson, a solicitor of this court, was solicitor. This suit, he contends, was brought by him in pursuance of a preliminary contract made between himself and the defendant Schauble, by which Wilson was to have one-third of the proceeds of the suit, and the fund in court aforesaid is admitted to be a part of the proceeds of a settlement of that suit.

Two questions are involved, both of which must be resolved in the complainant's favor in order to give him the relief now sought.

First. Was the contract made as alleged?

Second. Did it give him, Wilson, such an interest in the proceeds of the suit as to enable him to maintain this equitable action?

The first question is one of fact, and its solution depends upon the consideration of a variety of circumstances and a careful examination of several rather bulky affidavits. For present purposes, it will be sufficient if I shall find that it is probable that on the final hearing of the cause, and an opportunity on each side for cross-examination, the complainant will succeed in establishing the contract.

The complainant's contention is, in brief, as follows: In October, 1904, Schauble was the owner of one hundred and seventy-nine shares of the capital stock of the Rising Sun Brewing Company, and in that year transferred the same, for the sum of \$130,000, to one Nugent, who really bought in the interest of the defendant Seeber, to whom the stock was subsequently transferred, and in whose name it has since stood.

Schauble subsequently thought that he had been unfairly dealt with in the transaction. At and subsequent to that time, Judge Gilhooly, of Elizabeth, was his standing counsel in important matters, but Mr. A. J. David, a young lawyer in Elizabeth, was employed by him in unimportant matters. On divers occasions, and particularly in the early part of 1906, Schauble consulted with Judge Gilhooly as to his right to undo the transaction and recover the shares of stock, and wished to employ him

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to bring a suit for that purpose. Judge Gilhooly expressed doubts as to the prospect of a recovery, and finally declined to be retained for that purpose, stating that he had been somewhat involved in transactions connected with or growing out of the transfer of the stock, and suggested to Schauble that he employ the complainant Wilson for that purpose. Shortly after, and in the summer of 1906, Schauble called upon Wilson and expressed a wish to employ him, but stated that he had no money to invest in the suit, and desired that Wilson undertake it on shares. He gave Mr. Wilson the particulars of the case. That gentleman, learning from Mr. Gilhooly that he had no objections to his (Wilson) undertaking the suit, did undertake it, upon the agreement, as he swears, that he was to have one-third of the proceeds and to run all the risks of expenses and costs, provided that, after an examination of the circumstances, he thought it could be successfully carried through. He did make this examination, and commenced the preparation of his bill and affidavits, which I have seen, and they show a great deal of labor.

At the same time, before filing the bill, he asked Judge Gilhooly to draw a written agreement between him and Schauble as to compensation, which Gilhooly did, and which Wilson handed to Schauble, and which he said Mr. Schauble agreed to and promised to execute.

Before the agreement, however, was actually executed it came to the knowledge of Wilson that there was a scheme on foot by which the ownership of these shares of stock by Seeber might within a very short time be transferred to some other person, and he thereupon hurried matters, finished the preparation of Schauble's affidavit, and came before me on September 1st, 1906, at Morristown, with Schauble, and upon presentation of the bill I advised an order to show cause, with *interim* restraint against the transfer of the stock by Seeber.

Naturally, and at once upon obtaining this order, the question arose where the money was to come from in case Seeber should immediately tender a retransfer of the stock and demand a return of the purchase price, and Schauble at once asked the assistance of Wilson in procuring money for him. Nothing was said in the written unsigned contract which made it the duty of

Wilson to raise any money. Mr. Wilson applied to Mr. Gilhooly and learned from him that Mr. Isham, an Elizabeth capitalist, would advance the money, provided he could have the stock for the sum of \$155,000. Mr. Schauble, upon learning this from Wilson, agreed to it generally, or in part. Either Wilson or Gilhooly had prepared a contract to that effect to be signed by Schauble. That contract, however, was nominally with Judge Gilhooly, Isham's name not being mentioned in it. Objection was made to this contract by Schauble because it did not provide for protecting him against a suit which had been brought by the brewing company to enforce a large claim against him, which was then pending, and he wished that the sum to be paid him by Judge Gilhooly for the one hundred and seventy-nine shares of stock should be over and above any amount that he, Schauble, should be obliged to pay as a result of the suit of the brewing company against him.

In this state of affairs Mr. Wilson and Mr. Schauble met by appointment early in the morning at Judge Gilhooly's office, Schauble having both contracts in his possession—*first*, the one Judge Gilhooly had drawn between Wilson and Schauble, and *second*, the one between Schauble and Gilhooly for the sale by Schauble to Judge Gilhooly, acting for Mr. Isham, of the shares of stock, if recovered.

Mr. Schauble then informed Judge Gilhooly that he was entirely satisfied with the contract with Mr. Wilson for his compensation, but he wished the contract for the advancement of the money and the sale of the stock to Gilhooly to be amended in the respect previously mentioned. Mr. Gilhooly thereupon drafted a new contract between himself and Schauble, which was supposed to, and did in fact, cover the objection. Upon this new draft being shown to Schauble he expressed no dissatisfaction with it, but said that before executing it he wished to submit it to Mr. David. This remark seems to have irritated Judge Gilhooly, and he declared that he would have neither of the papers executed in his office, and hastened the departure of Mr. Schauble. The result was that neither the contract with Mr. Wilson or that with Judge Gilhooly was ever executed.

On the return of the order to show cause, Mr. Wilson em-

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ployed Mr. Marsh, of Plainfield, as assistant counsel, and the hearing went over by consent.

In the meantime Schauble seems to have become either suspicious of complainant's sincerity in his devotions to Mr. Schauble's interest in the suit, or his ability to properly conduct it, and, besides employing Mr. David, sought to employ Mr. Colie, of the Essex bar, and asked Mr. Wilson to go with him to Mr. Colie's office as soon as the latter should return from Europe. A meeting took place at Mr. Colie's office about September 13th, in which the subject of Mr. Wilson's compensation was taken into consideration, Mr. Wilson insisting upon his contract in writing as already agreed upon, and that it should be signed. Mr. Colie, after hearing all the parties, acting as counsel for Schauble, prepared another agreement, which distinctly recognized and provided that complainant should have one-third of the recovery and one-third of any compromise, but in a subsequent clause provided that Schauble might discharge Wilson at a certain stage of the cause by paying him a comparatively small sum of money. This contract Wilson declined to sign.

I have stated Mr. Wilson's contention. It is thoroughly supported by his own affidavits, and as to the consent of Schauble to the terms of the contract, it is sustained by the affidavit of Judge Gilhooly. It is also sustained by the account of what occurred on the 13th day of September in the office of Mr. Colie. It is quite impossible to account for the provision for one-third compensation found in the contract prepared by Mr. Colie except upon the assumption that such proportion had been previously agreed upon.

The defendant Schauble, in opposition to the deposition of Judge Gilhooly and complainant, denies some of the allegations of the circumstances leading up to his employment of Mr. Wilson, and he denies that he ever agreed to give one-third, and he denies a part of what occurred in Judge Gilhooly's office on the occasion when the judge swears that the second draft of the contract was prepared by him between himself and Mr. Schauble. But I think that denial, when carefully examined and compared with the other affidavits, is not sufficient to overcome their probative force, and I think that the great probability is

that at the final hearing the complainant will be able, by clear preponderance of proof, to show that the written draft of a proposed contract between himself and Schauble was clearly assented to by Mr. Schauble, and that the suit which was commenced by him was so commenced on the strength of that contract.

I am entirely satisfied that Schauble was aware that Wilson prepared the bill and affidavits, and appeared before the vice-chancellor and procured an order to show cause, and employed assistant counsel on the occasion of the return of that order, upon the honest supposition that the written agreement which had been prepared, but not executed, was agreed to by Schauble, and would be executed. If I am right in this conclusion from the affidavits and circumstances of the case, then upon plain principles the mere non-execution of the contract is of slight importance.

No answers were ever put in to complainant's bill, and the result was that in the latter part of October that suit was settled by Schauble, behind complainant's back, by paying or securing to Schauble the sum of \$40,000, a portion of which, sufficient to pay the complainant, is, as before mentioned, now in the custody of Mr. David and under the control of the court.

The second question is whether that contract gives such an interest in the proceeds of that settlement as to enable the complainant to succeed in this suit.

The paper itself, prepared by Judge Gilhooly, purports to be dated on the day of August, 1906, and recites that Schauble had stated to Wilson the facts and circumstances attending the transfer of the stock, and that Schauble claims that the same was procured from him by fraud, and that he is now the owner of the stock, and that it is worth a larger sum than Seeber paid him, and that Schauble has asked Wilson to take proceedings to have the transfer set aside and the stock returned to him, and had proposed to Wilson that his compensation should be paid out of the sale of the stock when recovered, and not otherwise, and that Wilson should pay the court expenses, and that, in consideration of his services and assumption of costs, Schauble should pay Wilson a sum equal to the one-third part of the value

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of the stock over and above the amount for which it was sold to Seeber. Then comes the contract itself—that Wilson should commence suit in chancery praying for the annulment of the sale and a recovery of the stock, and

“will devote his best endeavors and energies in the prosecution of the suit until its final determination, and agrees to accept as compensation for his services and for such disbursements as he may be required to make, the one-third part of the value of said stock over and above the amount or sum paid by Seeber to Schauble, or the amount or sum that may be required to be paid by Schauble for the redemption of said stock.”

This event has never happened, but then follows this further provision:

“And he further agrees that in case a compromise is made by his consent in writing or settlement otherwise effected, in like manner to accept in payment of his services and disbursements as aforesaid the one-third part of the amount paid upon such compromise or settlement whether the same be received by said Schauble or not.”

Then follows this covenant on the part of Schauble:

“And the said Philip Schauble on his part, on performance by said Wilson of the services and covenants above named, agrees to *pay said Wilson the one-third part of whatever money shall be paid or received* by said Schauble or by any other person on his behalf in compromise or settlement of the aforesaid claim.”

There was a further agreement on his part that he would not settle or compromise, or sell or dispose of, his interest in the stock without the consent, in writing, of Wilson; and further,

“that if there is a decree that the stock shall be returned to Schauble that he would pay to Wilson one-third part of the value of the stock over and above the amount required to be paid by him for the redemption of the stock.”

Then follows a definition of what is meant by the “value of the stock.”

It is not necessary for present purposes to consider whether the agreement for one-third of the value of the stock, taken in connection with the clause providing against a settlement of the

claim or a transfer of the stock without the consent of Wilson, gave Wilson an interest in the stock itself, for it seems to me that the sole question for present purposes is the true construction of the clause by which Schauble

"agrees to pay said Wilson the one-third part of whatever money shall be paid to or received by Schauble or by any other person on his behalf in compromise or settlement of the aforesaid claim."

A great many authorities were cited by counsel on each side, showing commendable industry and research. I have gone through them all.

The general rule undoubtedly is that it must appear that the complainant has an interest, by the contract, in the very fund itself, either existing at the date of the contract or thereafter to come into existence.

In examining and considering the authorities, two matters must be borne in mind—*first*, that in England, and in many of the states of the union where the common-law doctrine of champerty still prevails, the question could not arise, and hence they are no authorities, and *second*, in examining the English cases, a rule arising out of their Bankrupt law, dealt with by me in *Board of Education v. Duparquet*, 50 N. J. Eq. (5 Dick.) 234 (and see *Ward v. Duncombe*, L. R. App. Cas. 369 (at p. 383 *et seq.*), *Lord Macnaughten*, 1893), must be borne in mind, since it has no application here.

Moreover, it must be remembered that this is not, in its present shape, a suit in which a third party is interested, but between the sole parties to the contract themselves.

It may, for present purposes, be admitted that a mere promise to pay out of a particular fund when received by the promisor will not amount to an assignment of an interest in the fund. I noticed this rule in *Lanigan v. Bradley & Currier Co.*, 50 N. J. Eq. (5 Dick.) (at p. 205, near the bottom). The cases referred to by the learned annotators of 2 *Lead. Cas. Eq.* 1644 were those where the fund sought to be charged was in nowise connected with, or the result of, the transaction out of which the debt arose which it was sought to charge upon it.

On the other hand, it seems clear that an order by a debtor in

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favor of his creditor, addressed to a third party, to pay that creditor out of a certain fund, either then existing or thereafter to exist, in the hands of that third party, gives an interest in that fund to the party in whose favor the order is drawn. And further, it may be said with safety that the rule is that the solution of the question will depend upon the proper construction of the language of the contract—whether that language be committed to writing or not—to be taken in connection with all the facts and circumstances of the case.

So construed, it seems to me that the complainant's case is free from serious doubt.

The first important element is that the fund in question is the immediate result of the litigation instituted by complainant, and is the very fund mentioned in the contract. In the next place, no other creditor or assignee is claiming it, and the case is free from all complications arising out of conflicting claims between two creditors or two assignees of the same fund, such as we find in most of the adjudged cases.

And the language is clear. Schauble agrees to pay Wilson "one-third part of whatever money shall be paid to or received by Schauble" by way of compromise, &c. The language is not to pay a sum equal to one-third, but to pay *the* one-third part.

The question of the effect of several such writings making up a contract was discussed first by Lord Langdale, as master of the rolls, in *Rodick v. Gandell*, 12 Beav. 325, and, on appeal from his decision, by Lord Truro, lord-chancellor, as reported in *Rodick v. Gandell*, 1 De G. Macn. & G. 763 (1851, 1852), where there is an exhaustive examination of the authorities.

Subsequently, in 1855, the subject came before Sir W. P. Wood, vice-chancellor, afterwards Lord Hatherly, in *Riccard v. Prichard*, 1 K. & J. 277; 1 Jur. (N. S.) 750. The vice-chancellor there abstracts the rule laid down by Lord Truro, *supra*, thus (1 Jur., N. S.), "that where there is an agreement between debtor and creditor that the debt owing shall be paid out of a particular fund coming to the debtor that creates a valid equitable charge upon the fund and operates as an equitable assignment of the fund *pro tanto*."

These English cases are all based upon the decision of Lord

Hardwicke, in *Row v. Dawson*, 1 Ves. Sr. 331 (1749). There Tonson and Conway loaned money to Gibson, who, by way of reimbursing those gentlemen, drew a draft on Swinburne, who was the deputy of Horace Walpole, a member of the cabinet in charge of the exchequer of England, with these words added: "Out of the money due to me from Horace Walpole out of the exchequer and what will be due at Michaelmas pay to Tonson and Conway, value received." Gibson became bankrupt and the question was whether the holders of this draft were first entitled to be paid the amount of the draft out of the moneys due to Gibson from the exchequer. Lord Hardwicke held that the draft was clearly distinguishable from an ordinary bill of exchange and worked an assignment of so much of the money due to Gibson in favor of Tonson and Conway and gave them a preference.

Lord Hatherly's terse statement of the rule was approved by Mr. Justice Dixon in his opinion in *Terney v. Wilson*, 45 N. J. Law (16 Vr.) 282. The supreme court was there exercising its equitable jurisdiction in the matter of set-off to a judgment.

And the same doctrine was acted upon in *Brown v. Dunn*, 50 N. J. Law (21 Vr.) 111, also a case of the exercise of equitable jurisdiction by the court.

There is a case in New York of *Williams v. Ingersoll*, 89 N. Y. 508, which deals with the construction of instruments of this character, which seems to show that the law in the State of New York was, at one time, somewhat different. The learned judge there states (at p. 518) that "whatever the law may be elsewhere it must be regarded as the settled law of this state that an agreement either by parol or in writing to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment thereof," but he proceeds in that very case (at p. 521) to state a rule of law which seems to me directly in conflict with that previously stated. He uses this language: "It is not important to inquire here whether the agreement proved by the plaintiffs was an agreement to assign or an agreement for a lien upon any sum which might be recovered, for either agreement would have the same effect, as the plaintiffs' claim is for the full amount of the award. The agree-

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ment was not alone that the plaintiffs should be paid out of any sum recovered. Such an agreement, as I have above shown, would not have been sufficient to give the plaintiffs any claim upon the award. But there was also proof tending to show that it was the intention to assign to the plaintiffs or to give them a lien upon any sum recovered and retain out of it their compensation, and to pay the balance, if any, to Heath; and for the purpose of upholding the judgment we may assume that the trial judge found any facts which the evidence tended to establish. The form of words used in making the agreement is not alone to receive attention, but all the circumstances of the transaction are to be considered."

This was accompanied by an elaborate examination of the authorities and resulted in an unanimous decision of the court in favor of the lien in that case.

The later New York cases seem to have abandoned the seeming doctrine of the older. *Holmes v. Evans*, 129 N. Y. 140, is an example, and also a still later case of *Harwood v. La Grange*, 137 N. Y. 538, decided in 1893. The headnote of that is as follows:

"That when an attorney renders services in an action under an agreement that he shall receive his compensation *out of the proceeds thereof* he has an equitable lien upon or ownership as equitable assignee in such proceeds."

And the court, in sustaining that principle, refer to *Williams v. Ingersoll*, *supra*; *Fairbanks v. Sargent*, 104 N. Y. 104; *Boyle v. Boyle*, 106 N. Y. 654, and *Chester v. Jumel*, 125 N. Y. 237.

Defendant relies upon the recent case of *Weller & Lichtenstein v. Jersey City Street Railway Co.*, 68 N. J. Eq. (2 Robb.) 659. In that case the decision against the solicitors went on the grounds, in the first place, that the claim against the railway company was in its nature not capable of being assigned; and that there was in point of fact no actual product of the litigation, and no fund capable of assignment, and that the parties had a right to settle between themselves, which they had done. The suit was not, as here, by the solicitors against their client,

but by the solicitors against the defendant, the railway company, in the suit which they had brought for their client. That circumstance and the nature of the action—tort for personal injuries—combine to distinguish it from the present case.

The same may be said of several other cases cited by the defendant. For instance, *Kusterer v. City of Beaver Dam*, 14 N. W. Rep. 617. That was also an action for personal injuries against the city, where the plaintiff had entered into a contract with his attorneys to conduct the suit upon shares, and after issued was joined the city settled with Kusterer and took a release under seal, which they were allowed to plead *puis darrein*, and at the trial the court dismissed the action against the protest of the attorneys, and the latter appealed. It was held that it was impossible to grant the attorneys relief in the suit. The court made this remark: "Impressed with the equity of the claim on the part of the attorneys for the plaintiff, we have carefully reviewed many decisions with the view, if possible, of protecting them, at least to the extent of the taxable costs. But as the cause of action was not assignable, and hence remained, prior to judgment, under the absolute control of the plaintiff," the court concluded it was unable to assist them.

Another case is *Williams v. Miles*, 63 Neb. 851; 89 N. W. Rep. 455. That was a bill to set aside the probate of a will which had been instituted by several parties claiming under a supposed later will and as heirs-at-law. The solicitors had undertaken it under a contract for a share of the estate. After a defeat of the plaintiffs in the court below, and also on appeal, three of the plaintiffs moved to dismiss the bill of complaint as against themselves on equitable terms. This was resisted by the solicitors and it was held that they could not resist it. The court remarked: "Had the action proceeded to judgment on which would attach a lien in favor of plaintiff's attorneys, or were the controversy of such a character as to bring funds, money or property into the possession of the court or custody of the law on which the plaintiff's attorneys could claim a lien, legal or equitable, for the value of the professional services," &c., the court then asserted it had power to act, but went on to show that it would be impossible to compel the moving plaintiff to continue

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the action. The court did not determine as to whether the contract in that case, which seemed to be similar to that in this case, created a lien or not.

Another case cited is *Cameron v. Boeger*, 65 N. E. Rep. 690 (1902). The contract in that case was much like the present, and there was an attempt by the solicitor to open a decree of dismissal of the suit which had been entered by consent of the plaintiff in the suit behind the solicitor's back, and the court held it could not be done. The learned judge, however, proceeded to go into the merits and expressed the opinion that, according to the decisions in Illinois, the solicitor's contract gave him no lien on the fund.

One other western case cited by complainant is worthy of notice, viz., *Canty v. Lattemer*, 31 Minn. 239; 17 N. W. Rep. 385. That, as here, was an action by an attorney against his client, and the subject of the suit was in court. There a contract had been made by the defendant with the attorneys that they should prosecute an action against a railroad company to recover the amount due from the latter to the former for damages to his land by reason of the railroad company occupying it, and receive for his services a certain sum if he won the cause and nothing if he failed to do so; and the contract contained this further clause:

"I hereby agree that he (the attorney) shall receive said money from the Minnesota and St. Louis railroad out of the amount due me from said railroad company for running through my land, to be paid when suit is settled."

It was held that that contract amounted to an equitable assignment of the portion of the chose in action referred to entitling the attorney to receive the same specifically, and the railroad company having paid the money into court, it was held that he had a lien on the fund in court to that extent.

A consideration of all the cases cited do not alter the view above expressed, that the intention of the parties hereto, namely, the complainant, Wilson, and Mr. Schauble, was to have one-third of the very proceeds of the action, and that the contract gave him an equitable lien upon those proceeds when they took

form, and that this result is in accordance with equity and good conscience.

The defendant sets up against the whole of the complainant's case a charge that the complainant was not, in all that he did, in reality working for Schauble's interest, but that he was really working in the interest of Mr. Isham. Defendant asserts that Isham was under a contract to purchase this stock from Seeber at a date just after the 1st of September, which required a large amount of money on Isham's part; that the money market at that time was very stringent, and that Isham wished this injunction to be granted in order that he might be relieved of the necessity for carrying out his contract just at that time, and that the procurement of the injunction was in reality the scheme of Isham, devised and set on foot by him and his attorney, Judge Gilhooly, the real object of which was to relieve Isham.

He further asserts that it was a part of the scheme that advantage was to be taken of Schauble's necessity for money to extort from him a contract to sell the stock to Isham, and that Wilson, the complainant, was a party to the whole scheme. Without going into the details, it is enough for me to say that these assertions of defendant do not seem to me to be established by the affidavits in connection with the circumstances, to such a degree as to justify me in using them at this stage of the case in defeating complainant's lien on this fund. The great difficulty in adopting that view is that, in its worst aspect, it still left or resulted in a great benefit to the defendant. It put a large sum of money in his pocket. He was put into possession of facts and circumstances which went to support his claim to the stock which he had been seeking for a considerable time to enforce, and which he was unable to find any lawyer to take up, and which facts and circumstances, when set forth in a bill and supported by affidavits, procured by Wilson's industry, and possibly and probably with the help of Judge Gilhooly, the defendant, Seeber, was unable to meet, and finally was willing to pay \$40,000 in settlement.

It is further said that Wilson was all the while urging his client, Schauble, to accept Isham's proposition to furnish the necessary redemption funds, and that he declared that he felt

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bound to furnish the money. I have already called attention to the fact that there was no such undertaking on his part found in the written contract. At the same time he was naturally anxious to have Mr. Schauble provided with means necessary for the recovery of the stock, and very likely urged him to sign the second contract prepared by Gilhooly by which he was to receive \$25,000, beside a payment not exceeding \$7,500, for the purpose of settling the suit of the brewing company against himself.

That situation sufficiently, for present purposes, explains certain clauses in some of the affidavits made by the complainant in the main cause of *Schauble v. Seeber*, in opposition to a motion to dismiss that cause, which he resisted.

Upon the whole case I come to the conclusion that the restraint should be continued until the final hearing.

WILLIAM J. LONGLEY

v.

WILLIAM M. SPERRY and EDWARD GRAU.

[Decided May 15th, 1907.]

1. Plaintiff and B. purchased a livery stable in common, executing a chattel mortgage to the seller to secure their several notes for a part of the price, each being an endorser for the other. Plaintiff paid off his note, but while the other was outstanding B. applied to S. for a loan, and on being asked if he was the individual owner of the property replied that he was, "as the interest of another party therein had been paid off," without mentioning the name of the person otherwise interested, and also stated that there was a chattel mortgage on the property held by the original vendor to secure \$500 which was subsequently paid with a part of the money borrowed from S.—*Held* sufficient to charge S. with notice of plaintiff's interest in the property.

2. Plaintiff and B. having purchased a livery business, mortgaged the property to secure their several notes given for part of the price, on which each was endorser for the other. Plaintiff paid his note, and thereafter B., having wrongfully obtained possession of the mortgage, borrowed more

money from S., giving a chattel mortgage on the property with which he paid his note to a bank which had discounted it, and also executing an assignment of the vendor's original mortgage to S. B. then applied to plaintiff, offering to purchase his interest, producing to him the original chattel mortgage with the seals torn off, and the note stamped "paid" by the bank, whereupon plaintiff sold his interest to B., taking a chattel mortgage for a part of the price without knowledge of the assignment.—*Held*, that the assignment of the mortgage without the transfer of the unpaid note secured thereby conferred no rights on the assignee as against plaintiff.

3. The fact that the note and mortgage were presented by B. to plaintiff, the one with the seal torn off, and the other marked "paid" two months before its maturity, was insufficient to put plaintiff on inquiry, or excite suspicion that the note and mortgage had been stolen.

4. *P. L. 1902 p. 489 § 8*, providing that chattel mortgages duly recorded shall be valid against creditors of mortgagors and against subsequent purchasers, and mortgagees from the time of recording until the mortgages are canceled of record, was ineffective to validate, as against a subsequent mortgagee in good faith, a prior mortgage which had been in fact paid but which was not canceled of record.

5. *P. L. 1902 p. 488 § 6*, relating to chattel mortgages, provides that no chattel mortgage shall be recorded until its execution shall be first acknowledged or proved and certified in the manner required by the act respecting conveyances, which (*P. L. 1898 p. 678 § 22*) provides that the officer having first made known the contents of the instrument to the party making the acknowledgment and being satisfied that such party is the grantor, &c., shall make a certificate on, under or annexed to the deed or instrument.—*Held*, that where the certificate of acknowledgment to certain chattel mortgage assignments did not state that the contents of the assignments had been made known to the party acknowledging the execution thereof, the acknowledgments were fatally defective.

6. The record of chattel mortgage assignments not properly acknowledged, and, therefore, not entitled to record, did not operate as constructive notice to a subsequent mortgagee.

7. The rule that a chattel mortgage may be kept alive notwithstanding payment in order to secure another creditor of the mortgagor as against subsequent encumbrances or purchasers is inapplicable where the attempt to keep the mortgage alive has been made by only one of the mortgagors having only a third interest in the mortgaged chattels for the purpose of defrauding his co-owner.

8. Where an assignee of a mortgage permitted the note which it was given to secure to come into the hands of the mortgagor with evidence on its face that it had been paid and did not secure possession of the mortgage itself, which the mortgagor thereafter used to induce the belief on the part of his partner and subsequent mortgagee that the note had been paid, such assignee was not entitled to claim that the mortgage should be kept alive to secure money which he loaned to take up the note secured by the mortgage.

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9. Where one of the members of a firm engaged in operating a livery stable mortgaged the entire assets of the firm to raise money which he converted to his own use, such mortgage was only effective to create a lien on the mortgaging partner's interest in the firm after an accounting.

10. Where a chattel mortgage was properly executed, acknowledged and recorded, it operated as notice to a subsequent mortgagee under the express provisions of *P. L. 1898 p. 690 § 53*.

On final hearing on bill, answer and proofs.

Mr. Berkeley C. Austin, for the complainant.

Mr. William D. Wolfskiel, for the defendant Sperry.

PITNEY, ADVISORY MASTER.

The contest in this cause is over a sum of money in the hands of the court, which is the proceeds of the sale, by consent of the parties and the order of the court, of certain chattels constituting a livery stable plant known as the Golf Stables, situate at Cranford, New Jersey.

The question involved is, Which of two innocent parties—Longley and Sperry—shall suffer by the manifest fraud of a third party?

Both parties claim under chattel mortgages, and the question is one of priority, depending upon the effect of certain facts and circumstances in the cause. The facts are as follows:

In the last days of July, 1905, one James Z. Smith was the owner in possession of the chattels in question, and all parties claim through him.

On the 29th day of July, 1905, he conveyed the stable and contents and the lease of the realty to the complainant, Longley, and to one William E. Brock (who is the fraud-doer in the case), jointly, for the sum of \$3,000. Of this sum, \$2,000 was paid in cash, \$1,500 being paid by Longley and \$500 by Brock, and for the balance of \$1,000 they delivered to Smith their several promissory notes for \$500 each, one made by Longley, endorsed by Brock, payable six months after date, and one made by Brock, endorsed by Longley, payable twelve months after date.

Mr. Austin, a lawyer practicing at Cranford, seems to have attended to this matter professionally, and he swears that he promptly lodged the mortgage for record, and it so appears, and that it was duly returned to him from the office of the register, and that he mailed it immediately to Mr. Smith at Cranford. Mr. Smith swears that immediately after the sale, and while Brock was in possession managing the business for himself and Longley, his, Smith's mail, continued to be delivered at the stable. The fair inference from all the evidence, and this is Mr. Smith's theory, is that this mortgage was delivered from the post-office to the livery stable and there taken and kept by Brock. It is certain that it never came to the hands of Mr. Smith, and was next seen in the hands of Brock under circumstances presently to be stated.

Mr. Longley left the management of the business at the livery stable mainly, if not entirely, to Brock, but the bill and letter-heads of the concern were printed and the bills made out in the name of William E. Brock & Company.

Mr. Longley paid his note at maturity, which made him the owner of two-thirds interest in the plant.

Mr. Smith procured the note of Brock, with Smith's endorsement in addition to that of Longley, to be discounted at the Cranford bank.

Some time shortly before the 1st of June, 1906 (two months before maturity of Brock's note), Brock applied to the defendant Sperry (who was engaged in business in New York City, but seems to have lived and been acquainted in Cranford) for a loan of \$2,250 to be secured by a chattel mortgage on the stable. Sperry seems from his carefully prepared *ex parte* affidavit (received in evidence by consent without cross-examination) to have been satisfied to loan that amount, and for the purpose of carrying the affair through employed his regular New York attorney, Mr. John Hall Jones, with an office at No. 320 Broadway. Sperry learned from Brock that Smith held a chattel mortgage on the premises to secure \$500 and instructed Jones to procure an assignment of that mortgage. Jones thereupon communicated by telephone with Smith and arranged with him for a meeting on June 4th at Jones' office. On that day Sperry,

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Smith and Brock met in Jones' office, and it then appeared and was stated that the original mortgage could not be produced, and that the \$500 note of Brock was held by the Cranford bank. Sperry thereupon drew his check for \$525.33—the amount of the note with interest—to the order of the bank, and another check for \$1,724.67 (the balance of the \$2,250 to be loaned) to the order of Brock and delivered the same to a Mr. Nolan, apparently an attorney, but who was called in the case assistant to Mr. Jones, and whom I will call his clerk, with instructions that the same were to be delivered upon receiving from Mr. Smith an assignment of his mortgage and upon the execution by Brock of a chattel mortgage to Sperry. Mr. Jones caused to be prepared and executed by Smith an assignment of Smith's mortgage in which it is erroneously described as a mortgage dated August 1st, 1905, and made by Brock alone without stating the name of the mortgagee, and that assignment was executed on the same 4th day of June before Jones as a notary, and recorded that same afternoon.

On the same afternoon—according to Sperry's theory of the facts—Nolan, Brock and Smith proceeded to the bank at Cranford, and there Nolan handed the \$525.33 check to the proper officer of the bank, who produced Brock's note, endorsed by Longley and Smith, accepted the check, stamped the note paid, and handed it to Brock, the maker, and thereupon Smith delivered his assignment to Nolan, who caused the same to be recorded promptly.

The error in the description in Smith's assignment being detected—just when does not directly appear—a new assignment was prepared in Jones' office, executed, dated and recorded on the 5th day of June, wherein the mortgage was properly described, both as to date and the names of the mortgagors, Longley and Brock.

On the same 4th day of June Brock executed a chattel mortgage, prepared by Jones, to secure the whole sum of \$2,250, to which is annexed an affidavit made by Brock, the mortgagor, and not by Sperry, the mortgagee, stating that the true consideration was a loan of \$2,250, and that mortgage was acknowledged on the same day before Mr. Jones as a notary public, and was

recorded on the same day, and the check of Sperry for \$1,724.67 was duly delivered to Mr. Brock and paid on that day by the bank.

Mr. Jones, on being informed that the original note of Brock had been handed to Brock and kept by him, required and received from Brock a substituted note for \$500 to the order of Sperry, and due on August 1st, 1906, with interest from August 1st, 1905. Jones also prepared and required Brock to sign a statement under date of June 6th, 1906, that he, Brock, had destroyed the \$500 note and also the chattel mortgage given to secure it.

The foregoing facts are abstracted from the several affidavits of Sperry, Jones, Smith and Nolan, carefully prepared for use in contesting a motion by complainant for *interim* restraint against Sperry pending suit, and admitted in evidence by consent without cross-examination.

In this condition of affairs, on the 9th day of June, Brock proposed to Longley, who resided in Elizabeth, to purchase out his, Longley's, interest in the stable, and in that connection produced and showed to him the chattel mortgage given by the two to Smith, duly canceled by tearing off the seals, and the promissory note made by Brock and endorsed by Longley duly stamped paid by the bank. The chattel mortgage did not bear any evidence of having been satisfied of record.

A week later, on the 16th day of June, Longley and Brock concluded the contract of purchase and sale. Longley gave Brock a bill of sale and Brock gave Longley his note at one year for \$2,328.04 and a chattel mortgage covering the stable and having annexed an affidavit by Longley describing the note and stating that the note was executed and delivered for property purchased. The note and mortgage were dated back to June 1st in order to render it more easy to settle the partnership accounts between them.

Mr. Longley testified, and is not contradicted therein, that he had no notice of any facts or circumstances which could lead him to suspect, and he did not in fact suspect, that the Smith mortgage and note were paid by anybody but Brock, or that the

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mortgage had been assigned to anybody by Smith, or that Brock had executed any other mortgage to any other person.

On the other hand, Mr. Sperry swears that he had no notice that Longley had any interest in the business or in the stable. But not only was he a customer of the stable, whose bill-heads were printed William E. Brock & Company, but his affidavit before referred to contains a clause which is significant. It is as follows:

"Throughout this transaction deponent verily believed that said Brock was the individual owner of the chattels described in said mortgage, and that the same were free and clear from all encumbrances except the lien of \$500 held by said Smith, and had no information to the contrary until after the 18th day of June, 1906, deponent having been informed by said Brock that a claim formerly held by said Longley had been paid off. Deponent acted in entire good faith throughout the entire transaction, desiring to help said Brock and making the loan as an accommodation to him."

The witness here undoubtedly refers to the circumstance that shortly after Longley sold to Brock the latter in turn sold to Grau and absconded with some of the chattels conveyed. Sperry's information from Brock as to the state of the title of the goods was obtained in connection with the negotiation for his loan to Brock. Moreover, the *ex parte* affidavit of Jones, the attorney of Sperry, states that on the 1st day of June Sperry brought Brock to him and gave him instructions to prepare the necessary papers for a loan upon the Golf Stables. The affidavit then proceeds:

"Deponent asked said Brock if he was the individual owner of the goods and chattels in said Golf Stables and whether there was any encumbrance upon them. Said Brock replied that he was the owner thereof, *as the interest of another party therein had been paid off*, without mentioning the name of such other party, and that there was a chattel mortgage upon said property held by James Z. Smith to secure the payment of \$500."

Then the affidavit proceeds to state the negotiations with Smith.

Here I find distinct notice to Sperry that Longley had previously had an interest in the property, and direct notice to his

attorney employed by him to transact the business that some other party did have an interest, but that he had been paid off.

On this point of previous notice to Sperry of Longley's interest there is another little piece of evidence furnished by the exhibits on the part of Sperry which was not noticed by counsel in argument, and which is not consonant with the order of events which I have previously given. Two checks, as we have seen, were drawn by Sperry, both dated June 4th, 1906, on the Cranford National Bank; one for \$1,724.67 in favor of Brock, and one for \$525.33 in favor of the bank. Now, the theory of Sperry's counsel is that the check to the order of the bank was presented and accepted by the bank, and the promissory note for \$500 delivered over to Brock on June 4th, and that the mistake in the description of the mortgage found in the first assignment was not discovered until the next day, June 5th, when a new assignment was prepared. Now, the chattel mortgage from Brock to Sperry was filed for record on June 4th at twenty-nine minutes after three in the afternoon, and the first assignment from Smith to Sperry was lodged for record on the same day at twenty-eight minutes after three.

Now, the larger check to Brock's order was stamped "paid" by the bank June 4th, 1906. Hence we may fairly infer from all the depositions that the check to Brock was not delivered to him until the chattel mortgage was lodged for record, so that he had time, after the recording of the mortgage, to get from Elizabeth to Cranford before the bank closed for business, and if Brock could get to the bank so could the clerk, Nolan. But the smaller check given to pay the note in the bank is stamped as having been paid on June 5th, a day later.

Now, the clerk, Nolan, fails in his affidavit to state or give the date or hour for any of these transactions. He simply says that he carried out his instructions from Mr. Jones as to the giving of the check to the bank in payment of Brock's note, and neglected to get possession of the note itself.

Jones swears that on June 4th an appointment was made to close the transactions at the Cranford bank on the afternoon of that day, but he says that on the 5th of June he sent Nolan over to the register's office at Elizabeth to verify the description of

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the assignment in the mortgage, and Nolan found the description incorrect; that he, Jones, then prepared another assignment, and procured the execution of it by Smith and its record.

A careful examination of these carefully-prepared affidavits on the part of Sperry fail to state, except by inference, just when it was discovered that the description in the first assignment by Smith to Sperry of the Longley-Brock mortgage was erroneous. Now, if we ask why the smaller check given to the bank directly was not stamped "paid" at the same time that the larger check was so stamped, we find the answer in the circumstance that Nolan discovered the error when he went to the clerk's office to lodge the papers for record, and embraced that opportunity to examine the record of the missing mortgage. And this he would naturally do, for he was aware, undoubtedly, of the non-production of the older mortgage by Smith when he attempted to assign it to Sperry. And then, having discovered this error, he declined to use the smaller check until a new assignment was prepared and executed. This being done on the morning of the 5th of June, that second assignment was executed and recorded, and the Brock note paid and stamped accordingly. It is well to note in this connection that the stamp used by the bank in marking notes and checks "paid" is changed every morning, and it seems quite impossible to account for the smaller check bearing the stamp of June 5th while the larger check bears the stamp of June 4th, on the supposition that they were both paid on the same day.

Here, then, is evidence tending to show that the clerk, Nolan, discovered that the mortgage which was the subject of the assignment was executed by Longley, and that it contained the clause describing the notes accurately, adding, "which notes were given for a part of the purchase price for said goods and chattels," and the same expression occurs in the affidavit of Mr. Smith in that mortgage, and that this information was probably received by Nolan at the moment of the delivery of the chattel mortgage and the larger check to Brock. This was in ample time for him to have halted the transaction, either by withholding the check from Brock or stopping its payment at the bank.

For all these reasons I come to the conclusion that Sperry had notice of such facts and circumstances as clearly to put him on inquiry as to Longley's interest in these chattels, and the case must be considered on that basis.

But Sperry, in his affidavit prepared for use on the motion for injunction, states that he first commenced foreclosure proceedings on the \$500 mortgage, and shortly after also proceeded under the mortgage direct from Brock to him, and that shortly after that, ascertaining that the mortgage given by Brock was fatally defective, he had abandoned proceedings under that and had fallen back on his assignment of the smaller mortgage. But it is proper to say that in his answer he claims under both instruments.

We come now to the situation of the complainant, Longley, and inquire whether he is chargeable with notice that the older mortgage had been assigned to anybody.

And in the first place, it was brought to him by his co-mortgagor, Brock, with the seals torn off and with the note which it was given to secure stamped "paid" by the bank. Now, it seems to me that such production of the mortgage and the note was the very best evidence that the whole had been actually paid and discharged.

The case might have been different if the note had not been produced stamped "paid" by the bank. In this respect the case is in marked contrast with the famous case of *Harrison v. Johnson*, 18 N. J. Eq. (3 C. E. Gr.) 420; S. C., on appeal, *Harrison v. New Jersey Railroad and Transportation Co.*, 19 N. J. Eq. (4 C. E. Gr.) 488, where the mortgage was produced without the bond which it secured, or any proof of its payment, and under circumstances which the court thought put the party relying upon its cancellation upon inquiry. The rule is there stated with great clearness, and acted upon, that if the debt is paid the mortgage is gone as a lien.

In the case on appeal (at p. 500) Chief-Justice Beasley uses this language: "For it is clear, I think, that the exhibition of the mortgage did not show that the debt secured by it was paid. On the contrary, it evinced that there was a bond outstanding which was the legitimate evidence of such indebtedness. The

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mortgage is the mere adjunct of the bond, which is the obligation manifesting the debt, and which, wherever it may reside, draws its adjunct to it. It is common knowledge that when the bond is assigned it carries in equity the mortgage security with it, and the consequence is that the mortgage is often in one hand and the equitable right in the other."

It follows in this case that the assignment of the mortgage, without the transfer of the note unpaid with it, amounted to nothing. Nor can I perceive that the fact that the note and mortgage were presented by Brock to Longley, the one with the seals torn off and the other marked "paid," two months before their maturity ought to have put Longley on any inquiry or excitable suspicion that they had been stolen. My reason is that the exhibition of these papers was accompanied by a proposition to buy Longley out, and Longley may well have supposed that Brock had prepared himself to deal with him by first paying the note on which Longley was endorser. And here it may be well to mention that if anybody was in fault in permitting Brock to be in possession of the mortgage it was Smith, for, as we have seen, he knew that his mail was being handled by Brock, and yet it never occurred to him that Brock might have been tempted to get possession of the mortgage. And Sperry, taking title from Smith, not only was put on inquiry as to the actual possession of the mortgage, but he took it, so to speak, subject to whatever negligence Smith had been guilty of up to the date of the assignment.

But, be all that as it may, there can be no doubt that Sperry, through his attorney, is responsible for the note coming to the hands of Brock, who was thereby enabled to practice the fraud.

But counsel for Sperry rely on the eighth section of the Chattel Mortgage act of 1902 (*P. L. 1902 p. 487*), which provides that chattel mortgages duly recorded shall be valid against the creditors of the mortgagors, and against subsequent purchasers and mortgagees, from the time of the recording thereof until the same be *canceled of record*.

That section is a repetition of section 9 of the Chattel Mortgage act of 1885 (*Gen. Stat. p. 2114*), and the object of its insertion in the original act, as is well known, was to change the

old law, which provided that chattel mortgages must be filed and refiled, or in some way renewed, every year. Besides, it is quite impossible to suppose that the legislature meant to validate a mortgage that had been actually paid. And this view is strengthened when we observe that the language used is "creditors, subsequent purchasers and mortgagees," omitting the words "in good faith," which are found in section 4 of the revision and the corresponding section in the original statute. That this is the correct exposition of this section of the statute was held in *Meding v. Roe*, 53 N. J. Eq. (8 Dick.) 350 (at p. 358, near the bottom).

But the counsel for the defendant relies upon the fact that there was an assignment of the mortgage on record before Longley dealt with Brock on the strength of his possession of these securities, and that Longley is chargeable with notice of that assignment.

The complainant's counsel makes two answers to this. In the first place, that the possession under the circumstances of those securities, especially the note, was a dispensation to Longley of any duty on his part to examine the records. He knew that his own note, secured by the mortgage, was paid. His co-mortgagor brings him the other note stamped "paid," accompanied with the mortgage, and the question is, Why should he look further on the records? I am unable to understand on what principle he could be called upon to inquire any farther. And on this subject much of what was said by Justice Knapp, in *Heyder v. Excelsior Building and Loan Association*, 42 N. J. Eq. (15 Stew.) 403 (at p. 407), speaking for the court of errors and appeals, applies. The opinion of Advisory Master Williams in that case, and the opinion of Master Wilson in *Harrison v. Johnson*, *supra*, contain all the authorities up to that date.

The other answer made by counsel for Longley to the argument of the counsel for Sperry, based on the assignment, is this—that neither of those assignments as recorded were entitled to record because not acknowledged according to the laws of New Jersey, in that the certificates of acknowledgment do not contain the statement that the contents were made known to the party acknowledging the execution, and hence their record is

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not constructive notice. Their examination verifies that contention, and it remains to be determined what effect must be given to it. The chattel mortgage revision of 1902, in its sixth section, provides that no chattel mortgage shall be recorded until its execution

"shall be first acknowledged or proved and such acknowledgment or proof certified thereon in the manner prescribed by the act respecting conveyances."

That "Act Respecting Conveyances" is found in *P. L. 1898 p. 670 et seq.*, and the twenty-first section provides what deeds and instruments may be acknowledged and recorded, among which are "chattel mortgages, assignments, releases and discharges thereof." The twenty-second section provides how these instruments shall be acknowledged and the acknowledgment certified. After enumerating certain officers to take acknowledgments, it proceeds as follows:

"Such officer having first made known the contents thereof to such party making such acknowledgment, and being also satisfied that such party is the grantor in such deed or instrument, of all which the officer shall make his certificate on, under or annexed to said deed or instrument."

These certificates here in question fail in both these respects. Then the fifty-third section provides

"that any deed, &c., which shall have been duly executed, acknowledged or proved and certified as aforesaid, and shall have been duly recorded, &c., such record shall be notice to all subsequent judgment creditors, purchasers and mortgagees of the execution of said deed or instrument and the contents thereof."

The original act providing for the assignment of mortgages of real estate (*Gen. Stat. p. 2108*) provided that where a mortgage of lands is assigned and the assignment recorded, such record shall be notice to all persons concerned that said mortgage is so assigned; and further, that if the assignment is not recorded, payments made to the assignor in good faith, and without notice of the assignment and releases of mortgaged

premises, shall be valid in the absence of actual notice. It will be observed that the language above quoted from sections 53 and 54 of that act respecting conveyances (1898) do not, strictly speaking, apply to the case in hand; and further, the Chattel Mortgage act of 1902, respecting chattel mortgages, contains no clauses such as I have quoted relating to assignments of land mortgages.

But granting that the sections from the act respecting conveyances are broad enough to apply to the present case, we are then met with the old question whether an instrument, deed, mortgage or contract, not properly proved or acknowledged, but nevertheless recorded, is constructive notice binding on a party who has no actual notice because he thinks it not worth while to examine the public record.

My examination of that subject leads me to the conclusion that the great weight of authority and reason is that such record is not constructive notice. I shall not take time or space to cite the authorities. They are largely gone into by Mr. Wade in his treatise on the *Law of Notice*, and in the various treatises on mortgages. *Jones Chat. M.* §§ 247, 248. In the American notes to *LeNeve v. LeNeve*, 2 *White & T. Lead. Cas.* (4th Am. ed., from the 4th Lond. ed.) 206, the doctrine is thus stated:

"So a purchaser need not take notice of an instrument which does not appear to have been proved or acknowledged in accordance with the statute,"

citing a large number of cases.

Counsel for Sperry falls back upon the well-settled rule that a mortgage that has been paid may be kept alive, notwithstanding such payment, to secure another creditor of the mortgagor, or may be appropriated to other purposes than that for which it was originally executed and kept alive as against subsequent parties, encumbrancers, or purchasers. The doctrine is a familiar one, but has no application here, where the attempt was made to keep it alive by only one of the mortgagors, and that one having only a one-third interest in the chattels mortgaged, and that one-third interest subject to the superior lien of his co-mort-

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gagor and co-owner for any balance due to him on a settlement of the partnership affairs.

Further, in order to uphold the mortgage under such circumstances, the parties to the novation or new delivery of the mortgage must be careful not to do or omit anything which may lead a subsequent purchaser or encumbrancer to the just belief that the mortgage has been discharged. Here the parties to the attempted assignment of the mortgage permitted the leading document, the promissory note which it was given to secure, to come to the hands of the mortgagor with evidence on its face that it had been paid, and not only that, but did not secure possession of the mortgage itself.

Upon this, the most important part of the case, I conclude that Sperry's case fails, and that he can claim no relief under the old mortgage.

We come now to the larger mortgage from Brock to Sperry, given to secure the whole \$2,250. The joint ownership of the property having been established beyond all peradventure, the question is, What effect has that mortgage, or what effect could it have had if it had been properly and lawfully executed? The answer is plain that, as in favor of any person having notice of the joint ownership and *quasi* partnership, its only effect was to convey to the mortgagee the equitable interest which Brock had in the chattels covered by it after the affairs of the partnership were wound up and the actual amount coming to Brock ascertained. In other words, Sperry obtained the right, and no more, to have the partnership wound up in an orderly manner, and to receive the part coming to Brock. Longley had the superior right, as a partner, to enforce his general lien upon the partnership assets to secure anything that might be due from Sperry to the partnership upon a winding up.

But counsel for Sperry puts himself upon the proposition that each partner has the power to sell and dispose of the partnership property.

It is familiar law that the power of one partner over the property of the partnership is that of an agent, and is confined to the scope of the partnership business. It would be absurd to

hold that one partner in the business of keeping a livery stable would have the implied right, from the mere fact that he was keeping a livery stable, to sell out the whole plant and give a good title to it without the knowledge and consent of his partner, and the same consideration applies to the mortgaging of it.

The general rule is stated with approximate accuracy by Vice-Chancellor Reed, in *Carr v. Hertz*, 54 N. J. Eq. (9 Dick.) 127 (at p. 131), a case cited by counsel for Sperry in his argument. What was said by the learned vice-chancellor must be read in connection with the facts of the case, which was an attack upon certain mortgages given by one partner to creditors of the firm for the purpose of preferring such creditors against other creditors of the firm, and those mortgages were set aside by the vice-chancellor, and his decree was affirmed (at p. 700).

Turning to the present case, it does not necessarily appear that it was a part of the business of Longley and Brock to buy and sell horses as dealers. But, presumably, had Brock sold a horse and carriage apparently in the ordinary course of business he would have passed a good title. That, however, is quite a different matter from executing a chattel mortgage on the whole and appropriating the proceeds to his own use. This point, taken by counsel for Sperry, in my judgment, completely fails.

His next point is that although there is what in law amounts to no affidavit at all annexed to the mortgage, still, as it was properly acknowledged and recorded, the complainant being merely a subsequent purchaser of Sperry's one-third interest, and not a creditor, the mortgage is not invalid as against him because he has had constructive notice of it through the public record.

There is undoubtedly a decided difference in the standing of creditors and subsequent purchasers under the statute here in question, as was pointed out in the opinion of this court in *Roe v. Meding*, 53 N. J. Eq. (8 Dick.) 350, and the cases there cited, and counsel relies on the case of *Boice v. Conover*, 54 N. J. Eq. (9 Dick.) 531. But that was not a case where the prior mortgage was attacked for want of any affidavit made according to the statute, or that the affidavit which was properly made by

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one of the mortgagees was absolutely untrue, but the attack was made on the ground that the affidavit was misleading, and the consideration therein stated was false in that it treated a mere endorsement by the mortgagee as an indebtedness constituting part of the consideration, and that the remainder of the consideration was a debt due by one of the mortgagors only. For that reason it was held to be an improper and unlawful attempt to prefer creditors, and fraudulent and void as to creditors.

But as to Mrs. Boice it was held good because her mortgage, though subsequent in execution, was given by the same mortgagors, and she had full notice of the prior mortgage, and was therefore not a "*bona fide* purchaser," but must content herself with taking whatever interest the mortgagors had when they executed their mortgage.

The notice to Mrs. Boice of the prior mortgage was an actual notice, hence the question still remains whether the record in this case became, in the absence of any actual notice to Longley, constructive notice which binds him.

The mortgage to Sperry was properly acknowledged. The certificate declares that the contents were made known to Brock, &c. In fact, the mortgage was a New Jersey form with a New Jersey form of certificate. Hence it was entitled to record, and is not within the category of the two assignments of the older mortgage, whose acknowledgments were defective, and it only remains to inquire whether, under our statute, it is constructive notice. I have already cited a part of the twenty-first section of the act respecting conveyances of 1898, which shows that chattel mortgages are entitled to be recorded. By the fifty-third section, if properly acknowledged and recorded, all such

"instruments shall be thereafter notice to all subsequent judgment creditors, purchasers and mortgagees of the execution of said deed or instrument and of the contents thereof."

This statute is peremptory, and in effect declares that the record of the Sperry mortgage was notice to Longley of the existence of the mortgage and its contents.

Counsel for Longley, having his attention called to this aspect

of the case, argues that in the case of *Boice v. Conover, supra*, Mrs. Boice had actual notice of the former mortgage, and he attempts to distinguish between actual notice and the constructive notice resulting from registry. The language of the act as to the effect of registry is explicit—"shall be notice"—and I am unable to distinguish between actual notice and constructive notice due to the statute. No authority was produced by counsel to sustain his argument in that respect, and in my judgment, to sustain the distinction as claimed would have the effect of destroying the whole of the Registry act in the matter of notice.

The result, then, to which I have come is this—that Longley's mortgage is the first lien on the two-thirds interest in the chattels, and also that Longley has a partner's lien on the other one-third for any amount which, upon taking the account, it may be found that Brock has reduced his proportionate share in the property, if any, by overdraft. The evidence does not show how the amount for which Longley sold his interest to Brock was arrived at, and probably the absence of Brock from the state will render the taking of the account very difficult, and perhaps the books have not been kept in such a manner as to render it possible under any circumstances.

Be that as it may, unless the parties can agree upon a partition of the funds upon a basis of two-thirds to one-third, or some other basis, an account must be taken. I will settle the decree upon notice. The question of costs is reserved.

2 Buch. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.

EUREKA FIRE HOSE COMPANY

v.

EUREKA RUBBER MANUFACTURING COMPANY.

[Decided February 13th, 1907.]

1. A manufacturer of rubber goods who uses the word "Eureka," misleads the public, and gains an unmerited advantage from the trade reputation given to such word by another company which used such word in its corporate name, will be restrained from the use thereof, not only in its corporate title, and in connection with competitive goods, but also in connection with non-competitive goods manufactured by it, so long as it continues to manufacture any goods in competition with the company first using the word.

2. A final decree granting an injunction will not be modified by striking out words deliberately placed in the decree by the court, for the reasons given in deciding the case, which decree was affirmed on appeal, for the reasons given by the court below, since the application for the modification is substantially an application to the trial court for a rehearing after affirmance on appeal.

3. Provisions in a final decree authorizing either party to appeal to the court for further directions necessary to effectuate the decree or protect the rights of either party do not authorize the striking out of material words in such decree deliberately placed there by the court after due consideration.

4. A decree granting an injunction will not be construed on application for such construction, nor until the question comes regularly before the court, in proceedings requiring its construction and application to acts alleged to be done or omitted under it.

On application for modification of injunction issued on final decree.

Mr. John V. B. Wicoff, for the petitioner defendant.

Mr. Randolph Perkins and *Mr. Richard V. Lindabury*, for the complainant.

EMERY, V. C.

The bill in this case was purely an injunction bill, the terms of the injunction were defined by the decree, and on appeal the decree was affirmed. The injunction, issued after affirmance on appeal, follows precisely the terms of the decree. The present application to modify the injunction is therefore substantially an application to modify the final decree after its affirmance on appeal.

The final decree recited

"that the use of the word or name 'Eureka' by the defendant in its corporate title, or otherwise, in connection with the marketing of conductive hose in competition with the complainant, was and is unfair and fraudulent competition,"

and decreed that defendant be enjoined from using the word "Eureka" as part of the corporate title of the defendant, or in any form or combination, on or in connection with the advertisement or sale of conductive hose,

"and also from using the word 'Eureka' in the corporate title of the defendant, or otherwise, so long as the defendant manufactures or sells, or continues to manufacture or sell, conductive hose,"

and directed that a perpetual injunction do issue accordingly. The injunction against which relief is sought followed these terms. Defendant since the affirmance of the decree for injunction on appeal has changed its name to "Acme Rubber Manufacturing Company," and now applies for a modification of the injunction, by striking out the words "or otherwise" in the last paragraph, so that it shall read,

"and also from using the word 'Eureka' in the corporate title of defendant so long as it manufactures or sells, or continues to manufacture or sell, conductive hose."

Thus modified, the defendant, so long as it discontinues the use of the word "Eureka" in its corporate title only, would be able to use the name or word "Eureka" on or in connection with the non-competitive goods, which constitute its principal business,

2 Buch. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.

and have, as it says, acquired a value in connection with such use. The effect or probable effect of this use of the name "Eureka" on or in connection with the non-competitive goods, but while it still markets goods in competition, was, however, one of the points especially considered on the evidence at final hearing.

The complainant, as I concluded, had given a special reputation to "Eureka" goods in the market, and the defendant adopted and used this name in its corporate title and otherwise for the purpose of availing itself to some extent of the trade reputation complainant had given to goods marketed under that name. *Eureka Fire Hose Co. v. Eureka Rubber Manufacturing Co.*, 69 N. J. Eq. (3 Robb.) 159. On this special subject, the extent to which the use of this trade name "Eureka" should be enjoined, my opinion was as follows:

"As to the extent to which the use of the name should be enjoined, the protection of complainant's trade name in connection with the marketing of goods manufactured in competition, is the limit of its rights. The bulk of defendant's business is in rubber mechanical goods, not dealt in by complainant, and for the purposes of this business it has the right to use the word as part of its name or otherwise. But, so long as it puts on the market goods in competition with complainant, the use of the word, in its name or otherwise, in connection with these goods, seems, under the evidence in the case, necessarily calculated to mislead the public, and to give defendant some advantage of complainant's trade reputation. I cannot see how complainant can be sure to receive the full benefit of the trade name to which it is entitled, except by enjoining defendant's use of the name in its title or otherwise, so long as it continues the manufacture or sale of the goods sold in competition with complainant. * * * The form of a limited injunction was not specially considered at the argument, and I will settle this upon notice if necessary."

These extracts show that the use of the name "Eureka," otherwise than in the corporate title, was specially considered in deciding the case, and it was again considered, or open for consideration, at the time of settling the final decree on special

notice. The insertion of the additional words "or otherwise" was therefore deliberate, and they were inserted because, under the evidence in the case, complainant seemed to be entitled to their insertion.

This portion of the injunction, it should be noted, was directed against unfair competition, not against the use of the name "Eureka" on the goods, and necessarily the terms of such injunction are best settled upon final hearing and as part of the whole case, while the whole evidence bearing on this subject is before the court.

On the appeal the whole question as to the extent of this and every other part of the injunction was open as to the propriety of their insertion in the decree, and if it was supposed to be improper, the attention of the court of errors and appeals should have been called to the objection.

The printed briefs of counsel for defendant on appeal do not, however, seem to have raised the question of this modification, or any modification, the principal contention being that no injunction should go against the use of the name in the corporate title.

On the appeal the decree was affirmed, for the reasons given by the court below, and these reasons must now be treated as the opinion of the appellate court on all points necessarily involved in the decision and decree.

The present application to modify the injunction and decree is thus substantially an application to this court for a rehearing of the cause on this point, after affirmance on appeal. One ground upon which the application to modify is based is the express provision in the final decree,

"that either party have leave to apply to this court at the foot of this decree for further directions, if it should appear to be necessary in order to effectuate this decree or to protect the rights of either party thereunder."

But it is well settled that, under a general leave reserved for further directions, an alteration of the decree made on the original hearing cannot be made, nor a decree inconsistent with it. *2 Dan. Ch. Pr. (Perk. ed.) 1452 (6th ed.) 1370, 1371.*

2 Buch.Smith v. Wigler.

The leave here reserved was, however, special, and extended only to directions for enforcing or protecting the rights granted by the decree, not to a modification of those rights.

Nor can the cause now be reheard in this court, for the purpose of altering or modifying this part of the decree or the injunction based on it, in order to remedy a supposed grievance or inconvenience consequent on the decree. Defendant also asks on this application a construction of the decree and injunction on the point whether its proposed use of the word "Eureka" will be a violation of the injunction, but the court has no authority to affect in advance the rights of the parties under the terms of the decree by a construction of the decree. Such construction cannot be given until the question comes regularly before it in proceedings requiring its construction, and application to acts alleged to be done or omitted under it.

The application to modify the injunction must therefore be denied, and the temporary restraint of the operation of the injunction must be discharged.

CHARLES H. SMITH

v.

JACOB WIGLER et al.

[Decided February 16th, 1907.]

1. A surety is not required to surrender any security given him against loss until his liability to pay is ended.

2. The burden is on a surety, in a suit to compel him to reassign a mortgage assigned to him as indemnity, to show that the mortgage was intended to secure him as surety, not only on a bail bond then executed, but on others that it might be necessary to give in the proceedings.

3. Evidence in a suit against a surety to compel him to reassign a mortgage assigned to him as indemnity considered and held that complainant was entitled to a decree directing a reassignment.

Smith v. Wigler.

72 Eq.

Heard on bill, answers, replication and proofs.

Mr. Frank E. Bradner, for the complainant.

Mr. Louis Hood, for the defendant Wigler.

EMERY, V. C.

Complainant, who owned a bond and mortgage for \$800, given by the defendant Ward, on lands in Essex county, assigned the bond and mortgage to the defendant Wigler. The assignment, dated August 18th, 1903, was in writing, and on its face was an absolute assignment, but it is admitted that the assignment was not absolute, but was intended to secure defendant Wigler against loss, by reason of his becoming bail on a recognizance in a criminal proceeding against one Edmund J. Smith, complainant's brother.

The complainant's brother had been arrested on a warrant issued July 31st, 1903, by United States Commissioner Jones, on a complaint for violation of the National Banking laws, and on August 18th was in the custody of the United States marshal before the commissioner. On that day defendant Wigler and one Hargraves gave bail in the sum of \$2,500 for the appearance of the prisoner before the commissioner on August 27th, 1903.

The defendant Wigler became bail at the request of the complainant and his brother, Albridge C. Smith, and to secure him against loss to the extent of \$1,250 (one-half of the bail bond) it was agreed that he should be secured by the mortgage in question for \$800, to be assigned by complainant, and by a note for \$450, to be given by Albridge C. Smith. The mortgage was assigned, and, together with the note for \$450, delivered to Wigler just before or at the time of his becoming bail on the 18th.

Complainant swears that according to his recollection there was a paper written at the time declaring the purpose of the assignment, but none has been produced, and no other witness corroborates him on this point. The note for \$450, written by Albridge C. Smith, who was himself an experienced lawyer, did express its purpose, as follows:

2 Buch.Smith v. Wigler.

"NEWARK, N. J., August 18th, 1903.

"In consideration of Jacob Wigler becoming surety for the appearance of Edmund J. Smith to answer a charge made against him on behalf of the Merchants National Bank of Newark, N. J., before S. Howell Jones, U. S. commissioner, I hereby agree to pay to him any loss he may suffer or incur by reason of being such surety, to the amount of \$450, if the said Edmund J. Smith shall neglect or refuse to appear in compliance with his recognizance.

(Signed) ALBRIDGE C. SMITH."

The accused did appear before the commissioner on August 27th, 1903, and, after a hearing on that day, was directed to be held in custody until bail in the sum of \$5,000 for his appearance at the next term of the United States district court to answer any indictment by the grand jury. He entered into recognizance in this increased sum of \$5,000, with the same sureties and was released. This recognizance was forfeited and judgment on it for \$5,000 against Wigler has been entered, upon which execution has been delivered, but no payment on account of it seems to have been made.

The disputed question in the case is one purely of fact and is, whether the mortgage was assigned solely to secure Wigler on the recognizance of \$2,500 for the prisoner's appearance before the commissioner for the examination on August 27th, or whether it was to secure him as well on any recognizance to be subsequently entered into for Edmund J. Smith's appearance to answer to any indictment found by the grand jury. If it was for appearance before the commissioner only, then Wigler's liability on the recognizance for that purpose is discharged and complainant is entitled to a return of the mortgage. If, however, the assignment was to secure defendant for the second recognizance as well, then, inasmuch as his liability under that recognizance has been fixed, and has not been wholly discharged, complainant is not entitled to the return of the security given to protect him. While it is true, as complainant insists, that under our decisions—*Jeffers v. Johnson*, 21 N. J. Law (1 Zab.) 73 (Supreme Court, 1847); *Miller v. Fries*, 66 N. J. Law (37 Vr.) 377 (Supreme Court, 1901)—it has been held that on a bond "to save and keep harmless," a surety cannot recover before payment, that principle does not require the surrender of any security the surety may have against loss if he does pay, until

Smith v. Wigler.

72 Bq.

his liability to pay is ended. If held, as Wigler claims, it may be that the government itself, if necessary, can reach this security in Wigler's hands for the purpose of satisfying the execution.

Neither complainant nor his brother, Albridge C. Smith, attended the hearing before the commissioner on the 27th, nor did either of them after the 18th, and before the second recognizance was given, have any communication with Wigler. Only one arrangement was made between the Smith brothers and Wigler to secure him for giving bail, and this was made at the commissioner's office on August 18th, and the disputed question is the extent to which they both then agreed to secure him. For it appears by the evidence of all the witnesses called to the conversation that Wigler was to be secured to the extent of \$1,250 by the brothers of Smith—\$800 by mortgage to be assigned by complainant, and \$450 by the note of the other brother. He was, by the agreement, to have security for \$1,250, and no difference was made or suggested as to the terms of security between the mortgage and the note, which together made up the whole security. The note, the only written evidence of any of the terms, limits the security to the appearance before the commissioner, and so far as Albridge C. Smith is concerned, its terms are final and conclusive and no others can be added. Defendant and a witness named Simon swear that both brothers agreed that the security should stand until the case was disposed of at Trenton, and that Wigler was to renew the recognizance for this purpose on the 27th if the prisoner was held. Both of the Smith brothers deny any such agreement, and say that the security was only for appearance before the commissioner. Their statement is corroborated by the terms of the note written by Smith, and delivered on that day to Wigler. Defendant charges that the note did not express the true agreement, and that the agreement actually made was fraudulently omitted by A. C. Smith, who drew it for himself, and was a deception on Wigler, who could not read. The evidence offered to support this charge of fraud is that of Garside, the United States marshal, who says that Albridge C. Smith told him immediately after the agreement was made that he had agreed with Wigler to continue the bail for the grand jury, and that he would not be there on the 27th. Albridge C.

*2 Buch.**Smith v. Wigler.*

Smith denies this positively. The whole question as to the extent to which the mortgage was assigned for security depends on the comparative credibility of the witnesses, affected as it is by the important fact that the extent of the security of the note (admittedly the same as the mortgage) was then fixed in writing.

Under the circumstances of this case the burden is on the defendant, I think, to satisfy the court that security was intended beyond the recognizance then actually entered into, and to show that the note did not express the true agreement between the parties. Upon the whole evidence, I think he has failed to establish this, and I conclude that the note did truly express the substantial agreement upon which both the assignment of mortgage and note were given. Wigler's general credibility on any point affecting his liability in the case is very seriously affected by his statement, that the commissioner on taking bail on the 27th of August told him it was for the same amount, \$2,500, and did not say it was for \$5,000. The commissioner denies this, and I believe him. Simon's evidence, too, must be considered in the light of the fact that, as it now appears, he was the person who in fact called up Wigler to come to the commissioner's after the hearing on the 27th of August, and told him to go on the new bond. Simon was also instrumental in getting Wigler to go on the first recognizance, for which Wigler was paid \$25 by the prisoner. And inasmuch as the whole matter of renewing the bail on the 27th seems to have been undertaken by the prisoner, Simon and Wigler, in the absence of the prisoner's brothers, and without sending for them, I am inclined to think that these three persons took it for granted that the security would continue if they renewed the bail, either in the same or in an increased amount, and that this view has probably colored the evidence of Wigler and Simon as to the original agreement. But whether this view is correct or not, I am clear that the evidence offered on behalf of defendant has not overcome the evidence of the Smiths, supported as it is by the terms of security written out in the note at the time. The explanation of the brothers of the reason for giving security only for a short time is reasonable, and the claim that the true

Naughton v. Elliott.72 Eq.

terms of the agreement were fraudulently suppressed from the note is without foundation.

Complainant is entitled to a decree directing the reassignment and delivery of the mortgage and also to an account of the interest received thereon by Wigler.

WILLIAM NAUGHTON

v.

GEORGE W. ELLIOTT.

[Decided February 19th, 1907.]

1. Where, in a suit by the vendee in a contract for the sale of land for specific performance, it appeared that after the time when conveyance should have been made defendant had leased the premises, on which there were buildings belonging to complainant, and which he had placed there under a lease, and that defendant had rented the real estate and buildings for a sum amounting to merely the value of the ground rent without regard to the building, on a decree for complainant, defendant should be charged, not only with such ground rent, but with the reasonable additional value of the rent of the buildings.

2. The fact that, on an application to restrain defendant from collecting the rents and for a receiver, by consent of all parties an order was made authorizing defendant to collect the rent until disposition of the litigation, did not sustain a contention that defendant had been in charge of the premises as a receiver for a certain period, and that during such period he should not be charged with more rent than he actually received.

On bill for specific performance. On settlement of account for rents, &c.

Mr. Frederick W. Hope, for the complainant.

Mr. William J. Leonard and *Mr. Sherrerd Depue*, for the defendant.

EMERY, V. C.

Complainant, as purchaser, has obtained a decree for specific performance against the vendor in possession, and the question now litigated is the amount of rents for which the vendor shall be charged for the property to be conveyed to complainant. He has received \$650 a year from December, 1902, to May 10th, 1905, when complainant took possession under order of court, and insists that this is the gross amount of rents with which he is chargeable.

Ordinarily, in the accounting on decree for specific performance, a vendor, in possession and in receipt of tenants' rents, is chargeable only with the rents actually received, but he may, under special circumstances, be charged with those which without his willful neglect or default he might have received if equitable and proper. *Fry Spec. Perf.* (4th ed.) §§ 1427, 1428.

The principle as stated by Lord Selbourne, chancellor, in *Phillips v. Silvester*, L. R. 8 Ch. App. 173, is "that where the vendor retains possession, it must be on the terms of his undertaking the duties of possession, while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, but a trustee who holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things he would be bound to do if he were a trustee for any person."

In the present case the complainant was a lessee of the premises with an option to purchase, which was duly exercised within the time limited, and before the expiration of the lease expiring November 10th, 1902. At that time a tenant was in possession under the complainant at a rental of \$1,100, and negotiations were pending for a renewal of the lease. The rental included both the land, to which defendant held the legal title, and the buildings, which were owned by complainant, and were occupied for the purpose of a hotel under a license. Complainant paid \$650 rental to defendant for the lands alone. On or shortly after the termination of the complainant's lease, defendant secured possession of the lands, by threatening to dispossess complainant's tenant, who then attorned to or leased from him at a rental of \$650 a year. The defendant says that this rental

was for the lands alone, and both he and the tenant Keenan in their affidavits or depositions called the rental ground rent, and it is the same sum which defendant had for some years received for the land alone. But the tenant occupied the buildings for hotel purposes, and the license was continued from year to year (apparently by the aid of both parties pending this litigation) until complainant received possession.

Defendant has offered and tendered by his answer \$800 to the complainant, as the purchase price of the buildings, if the option was not exercised or the buildings removed. While defendant says that he didn't think the buildings practically worth anything, it is clear, I think, that the continuance of the buildings on the land and their use for hotel purposes pending the litigation was a privilege or right which gave additional value to the premises for renting, and defendant was therefore bound, on renting the property, to see not only that his ground rent was secured, but also that a fair rental value in addition for the use of the buildings for hotel purposes on the land. He has failed either to secure or, so far as the evidence shows, to attempt to secure, as rent, anything more than that which would be rent for the land, all of which he claimed as his own. He seems to have taken the position that he had nothing to do with the rental of the buildings, and that the complainant must either take them off or collect his own rent for them. In this respect he took the risk of being finally held to be a trustee in possession either of the land or buildings.

In addition to the amount which he fixed as the rental value of the lands alone, the defendant should therefore be charged with such additional rent as he might have obtained by adding a fair rental value for the buildings used as a hotel. What this amount should be is not as clear upon the evidence as it should be, but as both parties have submitted all the proofs proposed to be given, I must reach the best conclusion practicable. Complainant claims that Keenan, the tenant, had agreed to renew his lease for \$1,000, and that he could have obtained at least this amount from another person. But Keenan denies any final arrangement to pay this amount, and it is apparent that this sum was intended to be paid only if substantial improvements

*2 Buch.**Naughton v. Elliott.*

were made. The other offer of \$1,100 was not definite or final. Keenan's present statement is that the \$650 paid was all the premises were worth, but, in my judgment, the ground rent alone was worth this amount on the basis of several years' valuation, and neither Keenan's nor the defendant's present statements after the fact ought to be accepted as evidence of very conclusive weight, that in bargaining with complainant's tenant originally for the lease defendant could not have obtained additional rent for the buildings had he desired to do so.

In the absence of any evidence showing that the defendant made any effort to procure for the rental of the whole property more than the amount of ground rent, he should be charged with a reasonable sum in addition for the occupation of the buildings for hotel purposes. I think \$200 a year should be added for this sum, and that the defendant during his occupation should be charged with the gross amount of rent at the rate of \$850 a year.

It was urged for defendant that, from December 10th, 1903, he was in charge of the premises as receiver, under an order of that date made in the cause, and, being in possession in that capacity, cannot be charged with more rent than the amount actually received. But this order of December 10th did not have, and was not intended to have, the effect of relieving him from any liability imposed on him as vendor on a subsequent accounting in the suit. It was an order made on an application to restrain him from collecting any rents from the premises in question, under the lease he had made to Keenan, and for a receiver of the premises, and, by consent of all parties, an order was made authorizing defendant

"to collect of the tenant, Keenan, the rent for the land in question in the suit, at the rate of \$650 per year, now due, or which may become due, until the suit was disposed of, and to hold this money collected subject to the order of the court,"

and the application for receiver was thereupon suspended. This order merely allowed defendant to collect the rent under the lease he had already made, he stipulating to hold the money collected. The order did not in terms pass on the question of

Butterworth-Judson Co. v. Central Railroad Co.72 Eq.

ultimate liability on accounting for rents as vendor trustee in possession if complainant obtained a decree, and no such question was then at issue. Defendant was not a receiver put in possession by the court, or acting as its officer, but was a defendant receiving rents under a lease made by himself, who, on his stipulation to hold the rents received, subject to the order of the court, was allowed to continue the collection of rents under the lease already made. The application to appoint any receiver was not acted on, but was expressly postponed. This order of December 10th should not, by any implication or construction, be extended to relieve defendant from any responsibility for rents beyond the amount he received.

The other items entering into the accounting were not disputed, and may be adjusted on final settlement of decree.

BUTTERWORTH-JUDSON COMPANY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

[Decided March 11th, 1907.]

1. Where a railroad purchased the fee of land for occupation by its tracks in the exercise of its public franchise of operating a railroad, one who had an easement of a right of way over such land, which easement was interfered with by the operation of the railroad, was entitled to compensation under the Eminent Domain act (*Revision, P. L. 1900 p. 79*), providing for compensation to all persons having any interest in the land taken.

2. An injunction will lie to restrain a railroad from occupying complainant's real estate, and to compel the removal of its tracks, unless compensation be made.

On bill for injunction. Heard on bill, amended bill, answer, replication and proofs.

2 Buch. Butterworth-Judson Co. v. Central Railroad Co.

Mr. John A. Miller, for the complainant.

Mr. George Holmes, for the defendant.

EMERY, V. C.

The construction and operation by the defendant of its railroad across the strip of land in question is an interference to some extent with the right of way over the strip, to which the complainant is entitled under its deeds. This results necessarily from the fact that by reason of such operation the complainant is at all times required to observe, at the place of crossing, increased care and attention to avoid danger, and is at some time during every day regularly deprived for a time of the use of the right of way at this crossing.

The railroad, as appears by the answer, is constructed and operated under the authority of defendant's charter and the provisions of the General Railroad law authorizing the construction of railroads and their use as public highways with the right of taking tolls. The construction therefore is made under express statutory authority to construct and operate for public use that which would otherwise be a nuisance to the complainant. The strip of land in question has been purchased by the defendant railroad company, which owns the fee thereof, subject to the complainant's right of way, but the ordinary use of the land by the owner of the fee does not include the erection and operation on it of a steam railroad for the purpose of reaching lands of other parties in the exercise of a public franchise of operating a railroad and taking tolls. The company sets up in its answer that the road runs from its Newark and New York branch to the factories on the meadows, and it was proven in the case that it is operated for that purpose. This makes the use of the railroad at the strip of land in question, the operation of a portion of its system which it holds under its charter and the General Railroad acts, and subject to the conditions provided by those acts, as to the interference with private rights in the lands on which the road is constructed and operated. One of these conditions is that private property cannot be taken for

public use without just compensation first made, and the interference in any manner whatever with complainant's easement of the right of way in question is a taking of the complainant's property under the statute. The General Eminent Domain act (*Revision, P. L. 1900 p. 79, &c.*) provides for compensation to the owners, occupants and all persons appearing of record to have any interest in the land taken, and under statutes of this character, it is settled that persons holding easements of right of way are included as persons interested. *State National Railway Co., prosecutor, v. Easton and Amboy Railroad Co.*, 36 N. J. Law (7 Vr.) 181, 184 (*Supreme Court, 1873*). The amount of compensation depends, of course, on the extent of interference, but the complainant has a right to compensation for any permanent disturbance of its right of way by the construction or operation over the strip in question of a steam railroad as a public highway for the payment of tolls.

The claim on the part of the defendant, that this construction and operation of a railroad is an exercise of the reserved powers of the owner of the fee to use his own land in such a way as not to interfere with the right of way, is not well founded, either in fact or in law, and does not, in my judgment, reach the case, which is altogether one of interference with complainant's right of way under powers given to defendant by its charter and the railroad acts. The situation and rights of the parties, both as to fact and law, are controlled by those acts, and not by the rules regulating the ordinary use by the owner as of common right of land subject to a private right of way.

I conclude, therefore, that so far as the rights of the complainant are concerned, I must declare that its right has been interfered with, and without the payment or tender of compensation therefor, provided for by the statute. I do not go into the extent of the interference, because, in the view I take of the case, that question is not at present material. As complainant did not consent to this erection or operation of the railroad across the strip of land in question, but did everything in its power to prevent it, it is a case where, I think, it is strictly entitled to the protection of its constitutional and statutory right to compensation, by the exercise of the power of this court to enjoin

2 Buch.Leach v. Leach.

the further operation of the railroad and compel the removal of the tracks, unless compensation is made. See cases cited in *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416, 419 (*Court of Errors and Appeals*, 1886). The complainant's right to an easement being admitted, and the facts on which the claim of right to interfere therewith is based being undisputed, there is no reason for sending complainant to a court of law merely to determine whether on these facts the interference is the lawful exercise of the common-law rights of an owner of land subject to an easement, or whether it is a taking of lands for public use under statutory authority. If it is such taking, then the right can be ultimately protected only by an injunction, and the case being on final hearing here, the relief should now be granted. But inasmuch as defendant would be entitled to take proceedings for condemnation, I will hear parties on the settlement of the decree as to whether the issuing of the injunction should be delayed until a time fixed, in order to give the defendant opportunity to institute condemnation proceedings, and will at the same time hear them on the terms, if any, upon which such delay should be made in the issuance of the injunction.

MERRITT LEACH

v.

HARRIET G. LEACH et al.

[Decided April 3d, 1907.]

1. Where a special order was made in a case on notice in regard to the signing of testimony on reference to a master, and that order has not been appealed from, exceptions to the testimony on the ground that it had not been read over or signed by the witnesses cannot be considered as well founded on exceptions to the master's report.

2. Where exceptant was not aggrieved by reason of the failure of a

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master in chancery to report on a matter as directed, his exceptions on account thereof will be overruled.

3. The law authorizing the payment of a sum in gross to the holder of a life estate, out of the proceeds of land sold on foreclosure proceedings, on consent of the person entitled thereto (*Chancery Act, Revision, P. L. 1902 pp. 531, 532 § 60*), passed subsequent to the marriage of complainant, the remainderman, to one of the defendants and after his title accrued, is not unconstitutional as depriving him of a vested right without his consent, since the amount to be paid to the life tenant is only the value of her interest, and the remainderman's rights beyond that are secure.

On exceptions to master's report.

Mr. James Steen, for the exceptant.

Mr. Arthur H. Lovell, for the complainant.

EMERY, V. C.

In this case, lands to which the wife had title, were sold in a foreclosure suit, and the surplus (\$551.50) over payment of the mortgage was paid into court. The husband had an estate by the curtesy initiate in the lands, and on application of the wife for the payment to her of the entire surplus in court, I decided that the respective interests of the husband and wife in the lands sold, and therefore in the proceeds of sale, were as follows, namely, that the wife had an estate for her life in the lands with remainder to the husband for his life, if he survived the wife, and then with remainder over to the issue in fee. On the death of the husband during the wife's life, the entire sum converted is to be paid to the wife. See my opinion in *Leach v. Leach*, 69 N. J. Eq. (3 Robb.) 620, referring to the cases. The Chancery act (*Revision, P. L. 1902 pp. 531, 532 § 60*) provides that when money is paid into court on foreclosure proceedings, the owner of any estate for life may apply for the payment of a gross sum in lieu of the estate, and that the court shall direct the payment of such gross sum as shall be deemed a just and reasonable satisfaction for said estate for life, and which the person entitled shall consent in writing to accept in lieu thereof. The wife applied for the immediate payment to her of all the money to which she was en-

2 Buch.Leach v. Leach.

titled, but the husband did not consent to the payment of any gross sum to the wife, or to take any gross sum in lieu of his interest. He insisted that only the interest on the sum in court should be paid to the wife. Inasmuch as the statute directing payment to the life tenant of a gross sum did not require the consent of the persons interested in remainder, I held that the payment might be made without such consent and directed that it should be referred to a master to ascertain the amount that should be paid to the wife for her life estate in the lands, and that the balance be invested during the lives of the husband and wife, for the benefit of the wife during their lives, and for the further benefit of the husband during his life, if he survived the wife, and that on the death of the husband during the wife's life, she should be entitled to the principal sum invested. The wife has filed in court her consent in writing under the statute to accept a gross sum in lieu of her life estate. The master has reported that the gross sum to be awarded to the wife is \$319.93.

Three exceptions are filed to the report.

First. That the testimony of the witnesses has not been read over or signed by them since the taking of the same. This exception is not well founded, for the reason that a special order was made in the case on notice, in reference to the signing of the testimony, and that order has not been appealed from.

The *second* exception is that the master has not complied with one direction in the order of reference, namely, fixing the value of the use and occupancy of the premises required by the order. This occupancy was that of the husband who had been in possession of the premises. The master has not made any report against the husband by reason of the value of this occupancy, but has simply reported the receipts for rents and payments. The husband is not aggrieved by reason of this failure to report on the value, and the exception must be overruled.

The *third* exception is really a reargument of the question decided on the former hearing, namely, whether the court has power, under the statute, to order the payment of a gross sum to the wife out of the proceeds of sale as the value of her life estate against the consent of the husband as entitled to a contingent estate in remainder. This argument is, perhaps, irregular, but

inasmuch as a question of some importance, involving the correctness of that decision, is now raised, and was not raised at the original hearing, and this hearing is virtually an application for final decree in the cause, on the exceptions, I will consider the case as open for reargument on the new point now raised, rather than put the parties to the expense or delay of a formal application for rehearing or an appeal for the purpose of arguing that question. The point is that the husband and wife were married in 1878 and before the passage of the law authorizing the payment of a sum in gross to the wife, out of the proceeds of sale as the value of her life estate, and that the law was passed after the husband's title accrued. It is now claimed that as against the husband, this provision of the latter law is unconstitutional, as depriving him of a vested right in property and that it cannot be enforced against his consent. There is no doubt that the conversion of the lands into money by the sale under foreclosure is a valid conversion under a superior right as to all persons, and the question therefore is whether, on the conversion of lands into money on a forced sale in foreclosure, the legislature has the right to terminate, at its discretion, the period when the money resulting from the sale, and the interest therein of a person *sui juris*, shall cease to be land or to be held as if it were land. The general course of legislation on this subject in the different states has recognized (and without exception, so far as I can find) the power of the legislature to fix the terms and conditions on which money resulting from the conversion of lands by sales in legal proceedings should be finally disposed of as money to the parties who were interested in the lands and legally capable of receiving the proceeds as money. For example, *Scrib. Dow.* (2 ed.) pp. 653, 654, gives the legislation in the different states on the payment to the widow of a gross sum out of the proceeds of sale of lands in which there was a dower right. Some of them, including New York and New Jersey, give the option to the widow alone to accept a gross sum out of the proceeds of sale, or to take the annual interest. Other states, by legislation, require the consent of all parties interested in the funds before the gross sum can be given. In some others, the determination and payment of the gross sum on the application of any party interested in the proceeds is left to the discre-

2 Buch.Leach v. Leach.

tion of the court. In *2 Freem. Part. p. 726 § 549*, he says that on the sale and distribution of proceeds of sale of lands in partition, the court has the power (among other things) to determine the value of estates for life or years, and of all future estates, vested and contingent, and to direct the amount to be paid to the holders of each of such estates. I find no cases holding that the legislature has not this power relating to the continuance of interests in the proceeds of sale as money, and the power to terminate this by fixing the present value of the estates of parties *sui juris* who are interested in the money. In our state, as in New York, the option is given to the tenant for the life estate or for years alone, and it therefore requires her assent alone.

There is no question here of the deprivation of property, for the amount to be paid to the wife is only the value of her interest, and the husband's rights beyond that are secure. So far as the mere question of property right is concerned, the conversion of lands into money, under a superior right, to which the tenure of the lands was subject, terminates *ipso facto* the precise property right in the lands, and the proceeds of sale in strict legal theory are held not as lands, but rather as in lieu of the lands, for the ultimate purpose of compensating the parties interested in the lands. The money cannot in fact be lands, and as money, is subject to contingencies (loss, shrinkage, &c.), from which estates in the lands itself would be free. Interest on the money during life is one way of giving compensation to the life tenant, but it is not the only method. A gross sum for the value of the life estate is another way, and it is within the power of the legislature either to fix this method of compensation or to confer upon the courts the power of fixing it and its terms and conditions. This selection of the methods for compensation is a necessary result of the lawful conversion of the lands into money, by the superior right, and is an incident to which the estates in the lands are subject. In *Ross v. Adams*, 28 N. J. Law (4 Dutch.) 161, 179 (1859), where the purchase price of lands taken in eminent domain proceedings was paid into court, the supreme court, in the absence of any statute, directed payment of sums in gross for the value of all the interests where the parties were *sui juris* and could receive it. The court of errors and appeals, 1 Vr. 504,

reversed the judgment on the point that the interests were not properly declared by the supreme court, and that the husband, to whom a payment was directed, was not entitled to any interest in the lands or proceeds. The judgment reversing directed the investment of the funds, but no question seems to have been made in the decision as to the power to direct a gross sum to be paid out of the proceeds, and the form of the judgment, which may have been by consent, cannot be considered as an adjudication overruling the opinion of the supreme court as to the power to direct a gross sum. It may, however, have the effect of rendering the opinion of the supreme court an *obiter dictum* and of confining its effect on the point now in question to the weight of the opinion of the judges delivering it. This aspect of it, when the question of the constitutionality of a law is raised, is important, for it shows that learned judges appeared to have no doubt of the validity of such procedure, even in the absence of statute, and this circumstance, taken in connection with the general course of legislation and practice under it, apparently unquestioned in this state as well as others, is sufficient to solve any doubtful question in favor of the validity of the law. On full consideration, therefore, of this point now raised, I think the conclusion reached on the original hearing was correct, and that this court has the right, under this legislation, and on the option of the life tenant alone, who is *sui juris*, to terminate the holding of the entire proceeds of sale in court, and to direct the payment to her in gross of the sum which has been fixed as the present value of her interest. The exceptions will be overruled, with costs, and a final decree be entered in accordance with the opinions.

2 Buch.Sivin v. Mutual Match Co.

SAMUEL SIVIN et al.

v.

THE MUTUAL MATCH COMPANY et al.

[Decided May 14th, 1907.]

The stockholders of a going corporation who have not paid up their stock in full cannot maintain an action to compel other stockholders to pay up unpaid stock.

Heard on bill, answer, replication and proofs.

Mr. Merritt J. Lane, and *Mr. Kaplan* (of the New York bar),
for the complainants.

Mr. Joseph Kahrs and *Mr. Nathan Bilder*, and *Mr. Max D. Steuer* (of the New York bar), for the defendants.

EMERY, V. C.

The principal object of this bill, which is filed by several stockholders of the Mutual Match Company, is to compel the defendant stockholders to pay up in full and to par value the stock issued to them. The defendant stockholders control the management of the company and the company is made defendant. The bill alleges that the complainants' stock was purchased or taken on the false representation by the defendant stockholders that the defendants' stock was fully paid up in cash or property to the full value thereof. But the proofs show that this charge was unfounded, and they also show, as I conclude, that none of the stock issued, either that to complainants or defendants, is full paid, but was issued mainly for property purchased on a basis of valuation of about \$2.50 of stock to one dollar of money invested, or value of property transferred. The complainants acquired their stock as full paid in connection with the con-

veyance of property to the Mutual Match Company by the Columbia Match Company, in which complainants were stockholders, and it appears satisfactorily that they received this excessive amount of stock in order to put their relative interests in the Mutual company on substantially the same basis as the stock of the Mutual company already issued and proposed to be issued to the defendants, on completing the practical amalgamation or consolidation of the two companies, by a sale of the assets of the Columbia company to the Mutual company. As against creditors of the Mutual company, or any person suing in the right of creditors, and for the payment of the company's debts, none of the stock would be considered as paid-up stock under the statute, and all of the stockholders, complainants as well as defendants, would be liable ratably for the payment of the debts. This liability of stockholders to creditors is, however, worked out by an accounting of the debts to be paid, and the proportionate liability of each stockholder. If the company is in insolvency, the ratable liability is determined by a judicial hearing, ascertaining the quota due from each stockholder for the payment of all the debts—*Cumberland Lumber Co. v. Clinton Hill, &c., Co.*, 58 N. J. Eq. (12 Dick.) 627, 630 (*Court of Errors and Appeals*, 1898)—and if no receiver has been appointed, then by a bill in equity for an accounting to which the creditors and stockholders are parties. *Wetherbee v. Baker*, 35 N. J. Eq. (8 Stew.) 501, 506 (*Court of Errors and Appeals*, 1882).

In the present case the company is a going company, and the management of its affairs, including the right to call for payments on unpaid stock, is in the directors of the company. *Corporation act, Rev., P. L. 1896 p. 284 § 22*. According to some authorities such assessment when made should be made ratably on all the stockholders liable. 3 *Thomp. Corp.*, 79 Wis. 47; 47 N. W. Rep. 373, where a bill showing an unequal assessment was held to be demurrable. *Ibid.*, § 3539.

In this aspect of it the object of the bill is not to require an assessment by the directors on all unpaid stock, but for a direct decree to compel defendants, and defendants alone, to pay up their unpaid stock, and if such decree should be made, without

2 Buch.Sivin v. Mutual Match Co.

complainants also making any payments on their stock, it would result, of course, in giving complainants the substantial benefit of defendants' payments. So long as the company is a going concern, the court will not interfere on behalf of a stockholder who is in the same default, simply to compel another stockholder to pay up his unpaid stock.

There is no express statutory liability of one stockholder to another for the payment to the company of unpaid stock (as in the case of creditors—*Corporation act, Rev. 1896 § 21*), and the stockholder suing in the right of the company must not only establish the company's right to compel payment, but his suit is also subject to the application of the maxim, that he must come into equity with clean hands. The general rule is that a stockholder in the same default or participating in an alleged illegality or fraud, is estopped even from obtaining a decree in the company's right. 4 *Thomp. Corp. § 4497*. And as the complainants' default appears from the evidence necessarily taken as to the circumstances of the issue of their stock, the maxim withholding relief must be applied by the court in the exercise of equitable jurisdiction, whether the defence is specially pleaded or not.

If in the proper management of the company as a going concern, the duty to resort to the liability of a stockholder for payments on his unpaid stock should be shown, and it should also be shown that the directors, in violation of their duties and trusts to the company, or even to the stockholders who had paid in their stock in full, neglect or refuse to make such call, a court of chancery might, through a receiver or otherwise, make the assessment and call on the unpaid stock. But ordinarily such call or assessment would be made ratably on all stockholders liable. Such case or contingency should not be prejudged or affected by any refusal to compel payment in this case. So far, therefore, as the bill seeks to compel this payment, I will advise a decree of dismissal, but as the bill is filed in right of the company, the dismissal will be without prejudice to any bill or suit by the company, or on its behalf, after an assessment or call duly made on the defendants, or either of them, or to any bill or suit by or on behalf of the company, in the right of creditors of the company, or by or

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on behalf of the company by any stockholders other than the complainants.

The bill also sought to have a mortgage of \$12,000, held by defendant Cassel Cohen upon lands of the company, declared to be without consideration. This allegation was not sustained by the proofs, and at the oral argument no special relief against the mortgage was claimed. In the briefs sent in counsel for complainants, however, ask a reference to ascertain the amount due, and before advising a decree I will hear counsel (orally or by brief) on the right to any decree in this suit for relief touching this mortgage.

SIDNEY MITCHELL

v.

UNITED BOX BOARD AND PAPER COMPANY et al.

[Decided May 14th, 1907.]

1. An existing corporation agreed to sell its property to a new corporation organized by the officers of the existing corporation, the president and vice-president being the underwriters for twenty-five thousand shares of capital stock of the new corporation, being all of the stock except \$1,000 subscribed for organization purposes. The agreement gave to the stockholders of the existing corporation the prior right to subscribe for the stock of the new corporation, and stipulated for a cash installment and for the payment of the balance in installments. To what extent stockholders of the existing company had subscribed to the new stock, or whether any stockholders other than the president and vice-president had so subscribed, did not appear.—*Held*, that a dissenting stockholder could question the validity of the sale, notwithstanding the offer to sell stock, since the condition of subscription for stock in the new corporation made the stockholder liable for additional payments and required his participation in another company.

2. A sale by a corporation of its property may be adjudged voidable as against it, at its suit or at the suit of a dissenting stockholder, by reason of constructive fraud, arising from the fact that the sale was made to its directors or to a buyer controlled by them in making the purchase, or that the sale was not at a fair price.

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3. Contracts with a corporation for the services of a director, to be performed in the management of the ordinary business of a corporation, are valid, subject to judicial review, so far as the amount of compensation is concerned, either on behalf of stockholders of a going corporation or the creditors of an insolvent one.

4. Advances of money to a corporation by a director thereof may be secured, and a sale of property to the director to pay the debt is valid, so far as the transfer is concerned, subject to review on the question of the fairness of the price.

5. Where the proofs show that a dissenting stockholder, suing a corporation to restrain it from carrying out a contract for the sale of its property, may make out a case entitling him to avoid the sale on behalf of the corporation, he is entitled to such a preliminary injunction as will render a decree in favor of the corporation effective, if one should be finally made.

On application for preliminary injunction. Heard on bill and affidavits, answering affidavits and cross-examinations in open court.

Messrs. Griggs & Harding, Mr. Richard W. Morrison (of the New York bar), and *Mr. James Todd* (of the Chicago bar), for the complainant.

Mr. James E. Howell and *Mr. Frank R. Lawrence* (of the New York bar), for the defendants.

EMERY, V. C.

This is an injunction bill filed by a stockholder of the United Box Board Company against the company and its directors, and also against another corporation, the American Box Board Company, and its directors, to enjoin the execution of an agreement between the two defendant companies for the sale of certain assets of the United company to the American company. The defendant companies are corporations of this state. The agreement for sale is attacked as a fraud on the United company, and the bill is filed to protect its rights in the assets proposed to be sold. Application is now made for a preliminary injunction restraining the sale.

The affidavits disclose substantially the following facts: The United Box Board Company (which I shall call the *United*

company) is the owner of forty-two thousand nine hundred and eighty shares of the stock of the American Strawboard Company, of the par value of \$100 per share, which stock is pledged with the Trust Company of America as security for \$1,302,400 collateral trust bonds issued by the United company, and is also the owner of one thousand nine hundred and seventy-five shares of strawboard company stock not pledged as such security. It has also in its treasury for sale general mortgage bonds to the amount of \$975,000, these bonds being secured on property of the United company, other than the strawboard company stock. The United company has a floating debt of about \$850,000, and of this about \$765,000 has for some time been advanced by or carried on the credit of Mr. Barber, the president, and Mr. Fleming, the vice-president of the company, both of them directors of the company, by endorsements of the company's paper. As security for these advancements and endorsements they hold the \$975,000 bonds above referred to. Whether any others of the directors are creditors or endorsers does not clearly appear.

The United company, on December 20th, 1906, made an agreement with the American Box Board Company, a third company, for the sale to the latter of all of the strawboard company stock and \$562,500 of its general mortgage bonds. The entire purchase price of the stocks and bonds is fixed together at the single sum of \$850,000, payable in three installments of \$250,000 each, on the 15th day of January, April and July, 1907, respectively, and the balance of \$100,000 on October 15th, 1907. The American Box Board Company agrees, in addition, to execute an agreement assuming the payment of the outstanding collateral trust bonds, with interest, after January 15th, 1907, together with the sinking fund payments. The deliveries of the bonds and stock are, however, separated, and on the payment of the first installment of \$250,000 on account of the whole purchase price, mortgage bonds to the amount of \$300,000 are to be delivered, and on payment of the second installment of \$250,000 on account the remaining \$262,500 of bonds are to be delivered. On payment of the third installment of \$250,000 the one thousand nine hundred and seventy-five unpledged shares of the strawboard company stock are to be delivered to the American company, and

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the United company is then to deliver to the trust company (which holds the forty-two thousand nine hundred and eighty shares of strawboard company stock) an assignment to the American company of the equity in these shares, subject to the collateral trust mortgage. The trust company is to deliver this assignment to the American company upon payment to the trust company (for account of the United company) of the last installment of \$100,000, and upon the delivery to the trust company for account of the United company of a due and sufficient instrument in writing of the American company, assuming and agreeing to pay the collateral trust bonds, with interest.

The agreement contains two provisions, inserted, as is now claimed by the defendant directors, for the purpose of specially protecting the rights of the United company and all its stockholders. The first is a clause in the agreement by which the United company has the right to repurchase all of the property and rights to be sold to the American company at any time before January 2d, 1908, upon repayment to the United company of the purchase-money which has been paid, with ten per cent. interest, and surrendering for cancellation any agreements assuming payments on the collateral trust mortgage. The second is a provision by which the American company gives to the stockholders of the United company the prior right to subscribe for its stock, for the purpose of carrying out this agreement of sale between the two companies, and the terms of subscription offered by the American company for its full-paid shares of \$100 are cash installments of thirty-four per cent., three installments of ten per cent. each, payable on the 10th days of January, April and July, 1907, and four per cent. on October 10th, 1907, the balance as called for by the directors of the American company (not more than ten per cent. a year) until fully paid.

It is admitted in defendant's affidavits that the vendee company, the American Box Board Company, was organized at the instance of the officers and directors of the United company, and also that Messrs. Barber and Fleming are the underwriters for twenty-five thousand shares of its capital stock, being all of its stock except \$1,000 subscribed for organization purposes. To what extent stockholders of the United company have subscribed

to the American company stock, or whether any stockholders other than the defendant directors have so subscribed, does not appear. The condition of the subscription making the stockholder liable for additional payments, and requiring his participation in another company subject to other control, precludes this offer from being considered as substantially an offer of an equitable share as on a division of the assets of the United company, and entitles the United company, or a dissenting stockholder suing in its right, to question the sale without regard to such offer. The thirty-four per cent. cash subscriptions makes up the \$850,000 required for the cash payments of the agreement, which are proposed to be used by the directors of the vendor company to pay the floating debt of the vendor company due to or guaranteed by the two directors of the vendor company. The underwriting agreement of these two directors seems to be at present practically the sole asset of the vendee company, and in view of this situation it should, on the present application, be considered that the validity of the sale must or may be finally determined under the aspect of a sale to the two directors of the vendor company who control the vendee company, and whose claims against the vendor company are proposed to be satisfied from the proceeds of sale.

Counsel on both sides have argued the case from this standpoint, and complainant claims—*first*, that on the admitted facts the sale is illegal and void, and should be altogether restrained, without regard to the question of fairness of price; *second*, that the sale of the strawboard company stock is for a grossly inadequate price, and *third*, that the proposed sale is a scheme or conspiracy to deprive the United company of its most valuable asset and secure its benefit to the directors making the sale. On the part of the defendant directors it is claimed—*first*, that the sale is made by the directors as managers of the business of the company, and, in the absence of fraud or dishonest exercise of judgment, cannot be questioned by the company or stockholders suing in the right of the company; *second*, that the sale was for a full and fair price, and, in the present circumstances and financial condition of the company, is the best and only method of relieving it of pressing debts and assuring a more satisfactory finan-

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cial condition; *third*, that the charge of actual fraud and conspiracy to obtain the stock for the directors is without any foundation or warrant.

The charges of conspiracy and actual fraud seem to be fully and fairly answered by the affidavits, but in order to have relief on this bill it is not necessary, in my judgment, to prove such actual fraud. If the sale should be held voidable as against the vendor company, by reason of legal or constructive fraud, arising from the fact that the sale was made to its directors, or to a vendee controlled by them in making the purchase, or that the sale was not at a fair price, the sale might be set aside on this bill. The application will therefore be disposed of from that view of the scope of the bill.

As to the validity of a contract made by a corporation, through its directors, with one or more of their body, a distinction seems to be made in the decisions of our courts, dependent to some extent on the nature of the contract. Contracts for the services of a director, to be performed in the management of its ordinary business, are valid, but subject to judicial review so far as the amount of compensation is concerned, and this either on behalf of stockholders of a going corporation or the creditors of an insolvent corporation. I examined all the decisions of our courts on this point in *Lillard v. Oil, &c., Co.*, 70 N. J. Eq. (4 Robb.) 197. Advances of money by a director to the corporation may be secured, and a sale of property to the director, to pay such debt, is valid, so far as the transfer is concerned, but the price must be a fair one, and the price actually fixed is not final, but is subject to review. *Wilkinson v. Bauerle*, 41 N. J. Eq. (14 Stew.) 635, 643, &c. (*Court of Errors and Appeals*, 1886). In *Stewart v. Lehigh Valley Railroad Co.*, 38 N. J. Law (9 Vr.) 505, 522 (*Court of Errors and Appeals*, 1875), the language of Mr. Justice Dixon, while saving to the director of a corporation rights not arising out of express contract, including the right to the repayment of money loaned, is broad enough to exclude all express contracts, and if applicable to the circumstances of this case might make this sale altogether voidable by the company. For while the transaction in one aspect of it was, or may be claimed to be, a sale of the company's assets for the purpose of

paying its debts, yet in view of the fact that these debts and liabilities appear to be already secured by the deposit of mortgage bonds, the transaction in other aspects may be taken to be substantially an independent sale of the strawboard company stock, as to the advisability and terms of which the directors were so responsible to the company in their fiduciary capacity, that a sale to any of their number could be avoided by the company, without inquiry as to its terms or its favorable or unfavorable character. The general rule, that directors cannot lawfully enter into a contract in the benefit of which even one, without the knowledge and consent of the stockholders, of their number participates, was restated in *United States Steel Corporation v. Hodge*, 64 N. J. Eq. (19 Dick.) 813 (*Court of Errors and Appeals*, 1902), and declared to be so firmly entrenched as not to be open to debate. The power of the stockholders to affirm the contract made with a director was recognized in this case, and for the reason that such contracts are voidable only as against the company considered as composed of the whole body of stockholders, not voidable by each stockholder in his own individual right. *Lillard v. Oil, &c., Co.*, *supra* (*Vice-Chancellor Emery*, 1903). This view of the voidability of a contract of sale by a director to a corporation, and its affirmance by a stockholders' vote, is affirmed in a leading English case. *Northwestern Transportation Co. v. Beatty*, 12 App. Cas. 589 (*Jud. Comm.* 1887). In this case a director sold one of his own vessels to a shipping company, and the sale was affirmed by the stockholders with the aid of his own vote. Sir Richard Bagally says on this point: "The general principle is well established that, in the absence of charter provisions, a director of a company is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or

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improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it."

In the present case the agreement for sale was not communicated to the stockholders until after its execution. It has not been affirmed by the stockholders at any meeting, and if no such affirmance takes place one of the questions at final hearing will be whether the company (or complainant suing on its rights) can avoid the transaction as being substantially a sale of the company's assets to one or more of its directors, and not merely, as in *Wilkinson v. Bauerle*, an exercise in good faith of the power of the directors to sell or transfer assets of the company for the purpose of paying its debts, leaving the fairness of the price to be determined. If the sale should be held to be a proper exercise of the power of the directors, the further question will then arise as to the fairness of the transaction and of the price. If the sale is to be treated as a sale to the directors, then the burden of showing such fairness is on the directors. These questions cannot be properly decided until all of the facts relating to the sale and to the value of the strawboard company stock, and the probable effect upon the United company of the permanent withdrawal of the strawboard company stock from its assets and from its control, are developed at final hearing.

But inasmuch as the proofs now presented show that the complainant may at the hearing make out a case entitling him to avoid the sale on behalf of the company, he is entitled to such preliminary restraint as will render a decree in the company's favor effective, if it should finally be made. This can be secured, I think, by enjoining the final delivery of the shares of strawboard company stock, and the execution and delivery of the assignment of the shares of this stock now in the custody of the trust company, until the final hearing or further order.

As to the delivery of the bonds the situation is different. In the circular letter of December 20th, 1906, issued by the directors, announcing the sale to the American company and inviting stockholders to participate, the consideration price of the bonds and of the strawboard company stock is separated, \$400,000 being fixed as the value of the stock in the directors' judgment, and \$450,000 as the value of the \$562,500 bonds,

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being eighty per cent. of the par value. In the agreement, as above stated, on the first two payments, aggregating \$500,000, the bonds are to be delivered. No objection is made to the price of eighty per cent. fixed for the bonds, or to their sale to the American company at that price. It would seem, therefore, that no injunction should be issued against carrying out this portion of the agreement of sale if the American company and the directors of the United company choose to do so, and upon settling the order for preliminary injunction I will hear them as to the necessity or propriety of imposing, as a condition of granting the injunction, such terms as will protect defendants if this portion of the contract be carried out.

WILLIAM H. DIXON

v.

JOSEPHINE T. DIXON.

[Decided April 27th, 1907.]

1. Where a decree awarded the custody of certain children to their mother, but authorized the father to visit them at specified intervals, a letter written to the father by the mother's father that the mother had moved from New York to Portland, in the absence of any showing that the mother had authorized such statement, was insufficient to show that the mother had changed her permanent residence from New Jersey to Maine.

2. Where, in a proceeding to determine the custody of certain children, the mother answered, claiming the custody of the children, and the court awarded the same to her, with the provision that the father should be permitted to visit them, and it was established in that proceeding that the mother and the children were residents of New Jersey, the court, having acquired jurisdiction in the first instance, was entitled to modify the previous decree, notwithstanding the removal of the mother and children to another state.

3. A petition for the custody of children, as between parents living separately, authorized by *P. L. p. 263* § 8, in which a writ of *habeas*

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corpus may issue, as provided by section 12, is not a common-law *habeas corpus* proceeding, such writ being merely ancillary for the purpose of enabling the court to obtain jurisdiction of the children.

4. Where parents are living separately, the court may order their children kept within the state, or, if absent, brought within it.

5. Where the custody of children was awarded to the mother, who was living separate from the father, a modification of such order would not be made merely because the mother had taken the children to Maine, in the absence of proof that she intended to keep them there permanently, and to prevent the father from visiting the children as provided by the decree.

On petition for modification of order relating to custody of children.

Mr. Richard V. Lindabury, for the petitioner.

Mr. Gilbert Collins, for the defendant.

STEVENS, V. C.

On June 1st, 1905, William H. Dixon, the petitioner, filed his petition in this court, alleging that he and the defendant were married on January 30th, 1901, in the city of New York, and that they lived together in that city until May 3d, 1904, when his wife left him and went to live at her father's residence there; that they have two children, viz., William R., born March 19th, 1902, and Barbara W., born April 30th, 1903; that on June 8th, 1904, the defendant took the children to Madison, in this state, to live with her in a house provided by her father, at which place she had resided ever since. The petition alleged the father's willingness to provide for the children, and stated that he had difficulty in obtaining access to them. The prayer was for a writ of *habeas corpus*, to the end that an order might be made awarding their custody to the petitioner for the whole or a portion of the time, or for such other order with respect to their care and custody as should be just.

The defendant answered, denying that her father was a resident of New York, and averring that he had for several years been a citizen of New Jersey, with a home at Madison, where he resided during the greater portion of each year. She denied that

she and petitioner had lived in the city of New York up to May 3d, 1904, and averred that they had lived together in Madison during the summer of 1901, and that in May, 1903, petitioner having gone away for his health, she and her children had gone to her father's house in that town, and that in September, 1903, she and the petitioner, together with her children, after remaining a few days at her father's house in Madison, had taken possession of a neighboring house there, where they had continued to reside during the winter, and that she and her children had continued to live there ever since, except for a short interval.

It will thus be seen that at the commencement of the proceeding, and for two years prior thereto, the defendant and her children had been residents of New Jersey.

To the answer petitioner filed a replication, and the case was heard on the merits. The court decreed as follows:

"It is, on this 3d day of August, 1905, on motion of Collins & Corbin, solicitors of defendant, ordered that the prayer of the petitioner to have the custody of the children in the writ named, to wit, William H. Dixon, Jr., and Barbara Dixon, be denied, with costs.

"And it is further ordered that the petitioner shall be permitted to visit said children once in each week while living in Morristown, at such convenient time and place as the parties may agree, and that when the said children are living in New York they shall be taken, at least once in each week, for a reasonable time, at such convenient hour during the day as the petitioner may desire, to the house of the parents of the petitioner.

"Either party may apply to this court for further direction as there may be occasion."

The petitioner appealed from this decree, and on December 3d, 1906, it was affirmed by the court of errors and appeals.

Its correctness and propriety in all its parts is therefore beyond controversy.

On February 13th, 1907, William H. Dixon filed a supplemental petition stating most of the foregoing facts, and alleging that he had been permitted to have access to his children pursuant to the terms of the order up to Saturday, January 26th, 1907, but that on the 8th day of February, 1907, he was notified by her father that defendant had "moved" from Madison to Portland, and, on February 11th, that his wife and children

2 Buch.Dixon v. Dixon.

were at the Lafayette Hotel in that city. The first letter stated that it would be convenient (to Mrs. Dixon) that Mr. Dixon should see the children there, by appointment, as usual. The petitioner states that he is engaged in business in the city of New York, and that all his time is occupied therein except Saturday afternoons, and that it would be quite impossible for him to make weekly or even frequent visits to Portland.

The prayer is that if Mrs. Dixon is desirous of living in Portland she should not be permitted to keep the children there, and that she should be directed to return them either to the city of New York or to the State of New Jersey, with an alternative prayer that the custody of the children should be awarded to him.

An order to show cause why the prayer of the petitioner should not be granted was made upon the filing of the petition. It, with a copy thereof, was personally served upon the defendant in Portland. She appeared by counsel on the return day and opposed the making of any further order, but did not file an answer or make any statement with reference to her future plans. She insisted by counsel, in addition, that the court was without jurisdiction to make any further order in the premises inasmuch as it appeared that none of the parties were at present within the jurisdiction of the court.

There is no proof on the part of Mrs. Dixon that she is not a resident of New Jersey. Mr. Dixon's allegation in that regard is, not that his wife had ceased to be a resident, but that he has been informed by a letter, written by defendant's father in New York, that his daughter had "moved" from New York to Portland. It does not appear that Mr. Williams was authorized by his daughter to bind her to this statement. The word "moved" is somewhat indefinite. It may or may not, according to circumstance, warrant the inference of a permanent change of residence on her part. But if it be assumed that she has changed her residence, I am still of the opinion that the court has jurisdiction to modify its previous order. The wife's answer in the original proceeding demonstrates that she and her children were then residents of New Jersey. The proceeding was not a pure com-

mon-law *habeas corpus* proceeding—a proceeding which either terminated or continued the restraint and so ended—but a proceeding “before the chancellor under his general power to superintend the affairs of infants and to provide who shall permanently have the custody of them during minority.” *Rossell v. Rossell*, 64 N. J. Eq. (19 Dick.) 22; *State (Baird) v. Baird*, 19 N. J. Eq. (4 C. E. Gr.) 481; *Buckley v. Perrine*, 54 N. J. Eq. (9 Dick.) 285; S. C., 55 N. J. Eq. (10 Dick.) 515.

The proceeding by petition in a case where the parents are living separately is expressly authorized by section 8 of the act of 1902 respecting minors. *P. L. 1902 p. 263*. The petition in this case is entitled in the court of chancery and it prayed the appropriate process of *habeas corpus* in order to bring the infants before the court. This writ might have issued in such a proceeding prior to the act of 1902 (*State, Baird, pros., v. Baird*, 19 N. J. Eq. (4 C. E. Gr.) 481, 487), but it is expressly authorized by section 12. It is also provided in express terms by section 10 that the court may make the necessary orders from time to time in relation to the custody or possession.

The situation then is this: A proceeding was instituted whose scope was the permanent custody of two minor children, and it was so instituted under the general jurisdiction of the court of chancery as declared and regulated by express statute. Under such a proceeding any order made was, in the nature of things, temporary and open to such modification as the situation itself might from time to time call for. The order itself expressly provided that “either party may apply to this court for further direction as there may be occasion.”

Under the circumstances it would seem to be clear that the court, having at the beginning acquired complete jurisdiction over the defendant and her children, may continue to exercise that jurisdiction as occasion may require. In *Laing v. Rigney*, 160 U. S. 531, a wife, resident in New Jersey, filed a bill for divorce against her husband, resident in New York. The defendant appeared and answered. Then the wife filed a supplemental bill charging other acts of adultery subsequent to the filing of the original bill. A copy of this supplemental bill was,

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pursuant to order, served *out* of the jurisdiction. To this defendant did not appear, and a decree was made *ex parte* finding him guilty of the adultery charged "in the said bill and supplemental bill," and awarding alimony. On the decree, so far as it awarded alimony, the complainant instituted a suit in New York, and thereupon defendant's counsel applied to this court to have the decree amended so as to make it read that the defendant had been guilty of adultery only as charged in the supplemental bill. The decree was amended accordingly, and then the defence set up to the suit in New York was that inasmuch as defendant had not been served with a subpoena to answer the supplemental bill, and the defendant had not appeared thereto, and service of the supplemental bill in New York was irregular and invalid, the court was without jurisdiction to make the money decree. It was held, however, that this decree was, under the federal constitution, entitled to full faith and credit in the courts of the State of New York, and could not be there impeached. This case goes further than I am required to go in the case at bar. In a certain sense a supplemental bill, alleging a fresh cause of action, arising after the commencement of the suit, is a new proceeding not within the scope or contemplation of the original bill, but yet such a bill was regarded by the supreme court as a continuation only of the original proceeding, and on this theory it was held that jurisdiction, having once attached, continued to the end. *Lynde v. Lynde*, 181 U. S. 183, is in the same direction. The case in hand differs from the case of *Laing v. Rigney* in the important circumstance that from the very outset the proceeding was designed to regulate the custody and possession of the children by a succession of orders made from time to time as the then situation might require. The mere fact, therefore, that Mrs. Dixon may be out of the jurisdiction *now* cannot prevent the court from making such an order as the present situation may appear to warrant. It is not to be presumed that she will disobey.

As to the children, it has been repeatedly held that, if necessary, the court may order them to be kept within the state. *In re Agar-Ellis*, 24 Ch. Div. 317, 333; *Miner v. Miner*, 11 Ill.

43; *Campbell v. Campbell*, 37 Wis. 206, 221; *Ryce v. Ryce*, 52 Ind. 64. Or, if absent, brought within it. *Campbell v. Mackay*, 2 Myl. & C. 26; *Reg. v. Barnardo*, 23 Q. B. Div. 305; 24 Q. B. Div. 296; *Gordon v. Gordon*, Pro. Div. 141 (1903); *In re Jackson*, 15 Mich. 417, 420; *People, ex rel. Billotti, v. New York Asylum*, 57 App. Div. 383; *People, ex rel. Dunlap, v. N. Y. I. Society*, 58 App. Div. 133.

Whether the order already made, or any subsequent order, is of such a nature as to entitle it in other states to full faith and credit under the federal constitution is a question suggested by the argument, but not before me for decision.

The case was fully heard upon the merits in July, 1905. The children were then two and three years old. They were remitted to their mother because she was thought to be the proper person to care for them at their tender age. Nothing is alleged in the petition going to show that she has become an improper person to have charge of them, or that she should be deprived of their custody now. The order directed, however, that the petitioner should be permitted to visit them once a week, and of this permission he has regularly availed himself. It does not appear that it would be for the welfare of the children that he should not continue to see and interest himself in them. The strong presumption is that he should. I think the mother ought not to deprive the father of the opportunity of seeing them at short intervals, as she would do if she could keep them permanently in Maine. There is as yet little or no proof that she intends to do so, and I doubt whether I ought to make any new order till such proof be forthcoming. I will hear counsel on the question of whether a reference should not be ordered to ascertain the fact.

2 Buch. Pierce v. Old Dominion Copper Mining and Smelting Co.

JOHN H. PIERCE

v.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY
et als.

[Decided March 9th, 1907.]

A minority stockholder filed a bill against his corporation, its entire board of directors and other parties, the object of which was to protect the corporation by enjoining certain contracts or transactions into which the board of directors proposed to have the corporation enter. A preliminary injunction was refused upon grounds which largely involved the whole merits of the case.—*Held* (1), that complainant was not entitled on the final hearing to bring in separate grievances of the corporation against some of the defendants only who were directors of the corporation and obtain injunctive relief with reference to such grievances with which the other defendants were not concerned, and which were not within the scope of the broad relief prayed for against all the defendants; and (2) that the complainant was not entitled, after the most of the testimony in the cause had been taken, to set up by amendment to his bill a grievance against a part only of the defendants which arose before the filing of the bill, or to set up by an addition to the bill under Rule 210a such a grievance which arose after the filing of the bill; and that (3) the decree dismissing the bill would be made without prejudice to the filing hereafter of any bill on behalf of the complainant in respect of the grievances so excluded from consideration in this case.

On bill, answer and proofs.

Mr. Edward M. Colie, for the complainant.

Mr. Brundeis (of the Massachusetts bar) and *Mr. Charles L. Corbin*, for the defendants.

STEVENSON, V. C.

My conclusion is that the bill should be dismissed. The opinion denying the motion for a preliminary injunction deals with substantially the same case as that which was argued upon

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the final hearing. 67 N. J. Eq. (1 Robb.) 399. Any further elaborate discussion of this case seems to be unnecessary. The reasons for the final decree which I shall advise are, I think, sufficiently indicated in my former opinion for the purpose of any appeal which may be taken.

Counsel for the complainant urges the same arguments, and asks for the same drastic remedies which he presented and prayed for upon the hearing of the order to show cause. He insists that the large financial and mining operations in which the defendant the Old Dominion Copper Mining and Smelting Company is engaged or interested shall be paralyzed by an injunction restraining the officers and directors of that corporation from discharging their functions, and by the appointment of a receiver. Counsel has abandoned only the alternative prayer that, in case the court should refuse to appoint a receiver under its general equity power, then the corporation should be decreed to be insolvent and a statutory insolvency receiver be appointed.

Upon the final argument, which was exceedingly protracted, and in the elaborate brief on behalf of the complainant, it was insisted that in this case the court should at least enjoin certain particular operations of some of the defendants which may be generally described as instances of willful violation of duty and mismanagement on the part of the directors of the Old Dominion Copper Mining and Smelting Company, in which some of the other defendants are alleged to have participated. In my review of the testimony and the briefs I have endeavored to examine with care these particular charges. My conclusion is that they are not sustained, or if in any degree supported by the proofs as they now stand, and the legal presumptions established by those proofs, they ought not to be disposed of in this suit. An examination of the bill, including the specific prayers for relief, in my opinion shows conclusively that the complainant should not be allowed at the final hearing to bring in these separate grievances against some of the defendants only, and obtain injunctive relief, which, of course, would be confined to these particular grievances and affect only such of the defendants as have been connected therewith. Caution should be used I think in permitting an omnibus bill like this to be employed for remedying particular

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grievances against different groups of defendants when the broad relief prayed for against all the defendants is denied.

If, for instance, the directors of the Old Dominion Copper Mining and Smelting Company are actually diverting or misapplying in any way that portion of the property of the corporation which has been described as the "segregated assets"—if what they are doing is not merely a matter of bookkeeping beneficial to fourteen-fifteenths of their stockholders and not in the slightest degree injurious to the remaining stockholders—the complainant as the representative of the injured minority stockholders may file a distinct bill charging the directors with this misconduct. This matter as set forth or referred to in the bill of complaint is so directly connected with the broad objects of that bill, as presented in the stating part of the bill and the prayers for relief, that it is quite evident that those of the defendants who are in the slightest degree connected with this alleged grievance were not bound to dissect out this portion of the bill in which they alone were concerned, separate themselves from their co-defendants and defend themselves against this small dissected portion of the bill as an independent bill against themselves alone. They were not bound to cross-examine witnesses and introduce evidence in anticipation of the charge which the complainant makes definite or seeks to make definite only at the final hearing after the greater part of the testimony has been taken. The bill undertakes to attack the whole scheme which the majority stockholders of the Old Dominion Copper Mining and Smelting Company and all the stockholders of the United Globe Mines have devised for the distribution of whatever moneys the Old Dominion Company of Maine may receive in the shape of dividends from the proceeds of these "segregated assets" when disposed of by the Old Dominion Copper Mining and Smelting Company. There is no specific allegation in the bill that the directors of the last-mentioned company are wrongfully misapplying these so-called segregated assets. Such a charge presents a separate issue quite distinct from the issues presented by the bill, and one in which many of the defendants have no concern whatever. The proposed amendment submitted by counsel a year after the motion for the preliminary injunction had been decided, and when most of the

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testimony in the cause had been taken, in fact amounts to a separate bill of complaint against the Old Dominion Copper Mining and Smelting Company and its directors to enjoin a diversion or misappropriation of corporate assets. The impropriety of permitting such an amendment at such a time I think is apparent. It seems to me equally apparent that the proposed addition to the bill under rule 210a, setting up a grievance of the complainant against another set of these defendants, which arose after the filing of the bill, is equally improper.

In dealing with these applications to permit the complainant, who is denied the wide relief against all the defendants for which he filed his bill, to convert the bill on final hearing by amendments and additions into an instrument for obtaining particular relief against certain of the defendants only, it should be borne in mind that there is no allegation and no proof that the defendants who are alleged to be doing wrong are not amply responsible for all damages which the complainant may suffer. If the complainant should be allowed to make the amendment and the addition to his bill which he submitted at the final hearing, the defendants, of course, specially charged with wrong-doing in the amendment and addition, should have an opportunity to file answers. If such a course of procedure would be proper or necessary in any case, I do not think that such a case is now before this court.

The question also arises whether the proposed amendment and the proposed addition are not distinct equitable actions which could not properly be combined in one bill. It would seem that the United Globe Mines is a necessary party defendant in the one case, but hardly seems to be a proper party defendant in the other. Certainly it would not be permissible for the complainant to convert his bill with or without the aid of amendments and additions into a jumble of alleged equitable grievances against different sets of the original defendants. The bill of complaint in a case like this must to a large extent be construed as setting in court only the equitable cause of action against all of the defendants which it purports to exhibit. If, in addition to this, the pleader desires to bring into the cause a special grievance against a particular defendant with which the other defendants are not

2 Buch.**Sked v. Pennington Spring Water Co.**

concerned, based upon some part of a transaction described in the bill, I think, as a general rule, he should be obliged to make this particular cause of action distinct and indicate by his prayer for relief that, in addition to the broad relief against all of the defendants, he seeks the narrow and special relief against one defendant. Of course, such a bill would have to pass the test of multifariousness.

The bill will be dismissed without prejudice to the filing hereafter of any bill on behalf of the complainant to restrain the Old Dominion Copper Mining and Smelting Company and its directors from diverting or misapplying the so-called segregated assets, or any other assets of the corporation to the injury of the complainant, and from carrying out contracts which the complainant has a right to have declared void. Possibly the complainant may wish to prevent the decree from appearing to affect some other alleged causes of action against some of the other defendants which he has not succeeded in having recognized in this suit, but which are based upon some part or parts of the complex transactions set forth in the bill. Upon settlement of the decree these matters may be adjusted.

MARY J. SKED, individually and as guardian, &c.,

v.

PENNINGTON SPRING WATER COMPANY.

[Decided January 28th, 1907.]

Where the owner of land granted defendant the right to dig and build a reservoir at a certain spring on the land, the reservoir not to occupy more than one-half acre, and to lay pipes therefrom over such land and to draw the water from the reservoir, and defendant located a reservoir, an injunction would lie at the suit of the owner to restrain him from entering, after ten years, to put down a well in order to acquire an additional supply of water, although the well would be within an area, including a reservoir, of one-half an acre, if the boundaries should be fixed as desired by defendant.

*Sked v. Pennington Spring Water Co.*72 Eq.

On final hearing on pleadings and proofs.

Mr. Frank S. Katzenbach, Jr., and Mr. Frederick R. Brace,
for the complainants.

Mr. J. Lefferts Conard and Mr. John H. Backes, for the defendant.

BERGEN, V. C.

On September 14th, 1896, Phillip S. Sked, from whom these complainants took title, being the owner of a farm containing about one hundred and twenty acres of land, entered into an agreement with the defendant in writing, by the terms of which he granted, bargained and sold to the defendant the right to enter upon said premises

"to dig and build a reservoir at what is known as the 'Middle Spring,' the said reservoir not to occupy or cover more than one-half acre of land, also may lay pipes from the said reservoir over the lands of the said Phillip S. Sked, to the main pipe line of the said Pennington Spring Water Company three feet beneath the surface of the ground, and may draw and use all the water from said reservoir."

Immediately after the execution of the agreement the defendant entered upon the lands, built a reservoir, in which it collected the water from the spring, and for the past ten years has conducted the water thus impounded through pipes laid across the lands of the grantor to its main distributing pipe, and thus applied the water for public and private use as allowed by its charter. The area of ground covered by the reservoir is less than a half acre, and the defendant, now requiring a larger supply of water than flows from the spring, has recently, in order to acquire an additional supply, commenced sinking a well, by driving an iron tube into the ground, outside of the reservoir, upon lands adjacent thereto which would be within an area, including the reservoir, of one-half acre, if its boundaries be now fixed where the defendant desires. The complainants deny this right, insisting that, as no precise amount of land was granted, the only description being that the quantity taken should not exceed one-half acre, and the defendant having, by building its reservoir,

*2 Buch.**Sked v. Pennington Spring Water Co.*

established the area required for it, fixed, by practical location, the limit of the grant, has not now, after so long a period, the right to increase it in any direction it may choose, thereby taking lands of the complainants lying beyond the boundary of the original selection. The effect of the agreement is a grant to enter upon the lands now of the complainants, to dig and build a reservoir, to collect therein and draw therefrom, at its pleasure, the water flowing from the Middle Spring, and creates only an easement. In *Owen v. Field*, 102 Mass. 90, the grantor granted, sold and conveyed to the grantee the whole use of four springs, and the right and privilege of laying an aqueduct across other lands of the grantor, together with the right and privilege of making reservoirs, and in construing this grant the court said: "They were at liberty to dig up their pipes and abandon the enterprise whenever they found it for their interest to do so. The effect of the indenture seems to be that it gave a license or authority to the party of the second part to be exercised so long as they should see fit, or, more properly, that it granted to them an easement."

The agreement which we are now considering is substantially like the contract between the parties considered and interpreted by the court in the case just referred to. By it the defendant is to have the right to draw and use all of the water from the reservoir, which manifestly means all the water from the spring. The important element in the grant is the right to use and draw all the water from the spring, and such right is only an easement. *Race v. Ward*, 4 El. & B. 702. The defendant, having had granted to it, by the owner of a tract of land, a right to enter upon said lands, to build a reservoir thereon at what is known as the "Middle Spring," provided the reservoir should not occupy or cover more than one-half acre of ground, acquired an easement thereunder of indefinite location, but not the right to enlarge its scope where it had been once fixed and exercised in a definite manner. This defendant, acting under its grant, located its reservoir at the Middle Spring, and occupied therewith so much of the land as it deemed necessary for its purposes, and now, since the extent of the grant as determined by the defendant at the time has been acquiesced in by the parties for ten

years, it is committing an act which amounts to an enlargement of the easement, and violates the rule that when a grant is made in terms so general or indefinite that its construction is uncertain and ambiguous, the contemporaneous acts of the parties giving a practical construction to it is to be taken as a manifestation of the intention of the parties.

"When a right granted has been once exercised in a fixed and defined course with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee. If it be admitted that he has the right originally to select the place in which the easement is to be enjoyed, he cannot afterwards alter it. Convenience and justice both require this limitation on the right, otherwise it would be open to questions of great doubt, and would make the servient estate in a great measure subject to the unrestrained control of the owner of the easement." *Jennison v. Walker*, 77 Mass. 423. To the same effect is the opinion of Mr. Justice Knapp, delivering the judgment of our court of errors and appeals in *Jaqui v. Johnson*, 27 N. J. Eq. (12 C. E. Gr.) 526. See, also, *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Lore v. Stiles*, 25 N. J. Eq. (10 C. E. Gr.) 381, 383.

To adopt the view of the defendant in this case would permit it from time to time, without limitation, whenever it saw fit, to pass and repass over the lands of the complainants, either to make constant enlargements of the reservoir or to sink driven wells at its pleasure, thereby imposing a continuing burden upon the servient tenement which could not have been within the intention of either party when the grant was made. The grantor may be willing to suffer the inconvenience of a single invasion necessary for the purpose of constructing defendant's works, but it by no means follows that he would contract to allow constant invasions covering an indefinite period, and justice requires that this defendant be limited to the selection made by it as to the extent of the easement to be enjoyed by it under the indefinite terms of this grant.

As the defendant is putting upon complainants' land a permanent structure, and under its claim of right may continue to sink numerous wells, which, in my opinion, it has no right to do, I will advise a decree restraining it.

2 Buch. Egg Harbor Building and Loan Association v. Baake.

EGG HARBOR BUILDING AND LOAN ASSOCIATION

v.

CHARLES BAAKE et al.

[Decided February 16th, 1907.]

1. Since the right of a building association to impose fines against a defaulting stockholder is statutory, the legislature may control enforcements of fines, and *P. L. 1903 p. 473 § 43*, limiting the amount of fines that may be imposed against a defaulting stockholder, and section 56 (*p. 477*), providing that the provision shall apply to all associations, prevents a building association from imposing further fines, though the defaulting member's bond and mortgage were executed before the passage of the act.

2. The bond of a member of a building association did not provide for the payment of fines. The mortgage securing it recited that it conveyed real estate subject to the right of redemption on the member paying the principal sum, together with interest, monthly dues and fines, without referring to the by-laws of the association.—*Held*, that a decree foreclosing the mortgage could not include therein fines.

3. The by-law of a building association providing that every stockholder neglecting to pay his monthly dues, interest, &c., shall forfeit and pay the additional sum of two per cent. per month is ambiguous for failing to specify the principal sum on which the two per cent. is to be calculated, and will not be enforced.

On bill to foreclose. Hearing on order to show cause why final decree should not be opened and corrected as to amount due complainant.

Mr. Ulysses G. Styron, for the applicant.

Mr. William M. Clevenger, for the respondent.

BERGEN, V. C.

The complainant in this cause filed its bill of complaint against the defendants for the purpose of foreclosing a building and loan mortgage given to secure the principal sum of \$3,000. The date of the bond, as well as the mortgage given to secure its

payment, is December 18th, 1902. No interest was paid after February, 1903, and the master reported as due the complainant the principal sum of \$3,000, with interest from February 10th, 1903, to December 10th, 1906, making a total of \$3,690, upon which report the decree complained of was made. It is admitted that after the foreclosure proceedings were instituted, and in March, 1906, the defendants paid to the solicitor of record \$500 without, so far as appears, any application of the payment, whereupon the solicitor of the complainant paid the money to his client, who appropriated \$442.04 in payment of fines which it had charged against the stock of the corporation held by the defendants and assigned to the complainant as a collateral to the payment of the loan in the manner usually followed by building and loan associations, and \$57.96 on account of monthly premiums due and unpaid on account of such stock. The defendants insist that such application was erroneous because the payment was made after the complainant had elected to consider the principal and interest of its mortgage due, and therefore the payment to the solicitor who was employed to enforce the collection of the principal and interest could only be applied towards the liquidation of the particular claim, the payment of which he was then enforcing by foreclosure proceedings. The defendants also insist that the complainant is not entitled to charge them with any fines, or if such right existed, it did not reach the extent claimed by the complainant. The method adopted by the complainant in charging fines was cumulative. The account began in April, 1903, at sixty-seven cents, and amounted in March, 1906, to \$442.04. This result was reached by charging each month two per cent. on the total amount of the arrearage, each item of which making up the total having been previously charged a fine at the same rate.

Passing for the present the question of the right of this complainant to charge any fines under its constitution and by-laws, it is perfectly clear that every fine charged after October, 1903, is erroneous, if the act of the legislature of this state concerning building and loan associations, approved April 8th, 1903 (*P. L. 1903 p. 457*), has any application. Section 43 of that act declares that

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"if a member of any such association of the state, or doing business therein, shall fail, for six successive months, to pay his periodical installment, his membership in such association shall, at the option of the board of directors, thereupon cease and determine, *but in no case shall further fines or penalties be charged against his account.*"

It is urged on behalf of the complainant that as this bond and mortgage were executed before the act was approved it cannot affect this loan. Section 56 of the same act provides that its provisions relating to building and loan associations of this state shall apply to all such associations organized under any law of this state, and manifestly includes, so far as the legislature had the power to do it, the complainant corporation. The right to impose fines against a defaulting stockholder is entirely statutory, and in its nature penal. In my opinion, the legislature has the right to control the enforcement of the penalty, and certainly a court of equity will not give aid to a penalty which the law-making power has discountenanced and from which it has withdrawn its support. Therefore this complainant was not entitled to charge fines for a longer period than six months after April 8th, 1903, and having applied defendants' payment in satisfaction of an unlawful claim, the decree which recognizes, through a mistake of the master, this erroneous application should be corrected.

These foreclosure proceedings are directed towards the collection of the principal sum of the bond, with interest. The bond does not provide for the payment of any fines, and a satisfaction of the bond, according to its condition, would not require the defendants to pay them. The mortgage, after reciting the bond, conveys the real estate, subject to the right of redemption if the defendants pay the principal sum

"on the day and time hereinbefore mentioned and appointed for the payment thereof, together with interest for the same, * * * and shall pay all monthly dues on stock, installments of premium, interest and fines."

The word "hereinbefore" manifestly refers to the bond as recited in the mortgage, for in no other place therein is there any time mentioned as the payday. While the word "fines"

appears in the proviso of the mortgage, there is nothing in the instrument which fixes their amount or authorizes their imposition, nor does the redemption clause in the mortgage refer to the by-laws or constitution of the complainant association, or undertake to make either of them a part of the obligation. The by-law on this subject, to which I shall refer, merely provides that shareholders shall pay fines for defaults. It does not declare that fines may be collected out of the proceeds of sale of property pledged to secure a loan made to the member in default, and is subject to the criticism made by Mr. Justice Dixon, speaking for the court of errors and appeals, in *Bowen v. Lincoln Building and Loan Association*, 51 N. J. Eq. (6 Dick.) 272, 280.

After carefully considering the question whether the complainant is entitled, under its constitution and by-laws, to charge fines, I have reached the conclusion that the power does not exist. The only by-law of the complainant corporation on this subject is to be found under article 9, section 2, which reads as follows:

"Each and every stockholder, for neglecting to pay his monthly dues, interest, premium and other charges, shall forfeit and pay the additional sum of two per cent. per month."

This by-law establishes a forfeiture which must be strictly construed, and will not be aided by a liberal interpretation. It will be observed that it does not state upon what principal sum the two per cent. is to be calculated. The complainant interprets it to mean two per cent., not only upon the monthly dues, but upon the monthly total of all arrearages, upon the separate items of which the fines had been already levied, but we can, with equal propriety, read it to mean a fine to the extent of two per cent. per month upon the sum in default for the month, and not upon the aggregate sum of all defaults, and it would not be unreasonable to argue that under this by-law the penalty could be levied upon the principal sum of the debt, the expression "the additional sum of two per cent. per month" means a per centum charge upon some uncertain principal sum. This by-law is so uncertain as to which item or items the forfeiture shall attach that it deserves no assistance from a court of equity, and in my judgment it is too ambiguous to afford any support to the

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charges made by the complainant against the defendants' stock on account of fines.

As the complainant has made a misapplication of the sum of \$442.04, I think the defendants are entitled to have it applied where they now demand it shall be, and where I am strongly inclined to believe, considering the circumstances under which it was paid, it was first intended to be applied, and that is towards the reduction of the interest due on the mortgage.

The final decree will be opened, permitting this correction to be made, and at the same time another objection to the decree, which the complainant admitted on the argument was well founded, can also be made.

MARTHA F. WAHL

v.

FRANKLIN P. STOY.

[Submitted February 5th, 1907. Decided March 5th, 1907.]

1. A husband and wife owned adjoining lots in severalty. As a part of a sale of the husband's lot he and his wife executed an agreement reciting that one of the considerations of the conveyance was that no building should at any time be erected on the wife's lot nearer than five feet of the dividing line. The contract was originally intended to be signed by the husband alone, but the wife's name was subsequently interlined in ink as a party of the first part, though the other changes necessary to make the agreement conform to such change were not made, so that the covenants as written appeared only to bind the husband.—*Held*, that the contract, construed in accordance with the intent of the parties, was sufficient to bind the wife.

2. Where a husband and wife owned adjoining lots in severalty, and, as part of a sale of the husband's lot, the wife joined in a contract restricting the use of her lot by prohibiting an erection thereon less than five feet from the division line, her dower interest in her husband's lot constituted a sufficient consideration for her agreement, and was sufficient to bind her property by such restriction.

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3. Where an agreement imposed a building restriction on defendant's vendor, such restriction might be enforced by injunction against defendant who took with notice, though the agreement was not recorded.

4. At the time defendant purchased his lot, which adjoined plaintiff's property, the vendor's husband informed him that there was a restriction on the lot covering about five feet. Defendant then asked if the restriction prevented him from building a bay-window, and was informed that it related only to the body or wall of defendant's house. Defendant took no steps to ascertain the nature of the restriction from complainant, which in fact prohibited the construction of any part of a building nearer than five feet of complainant's west line.—*Held*, that defendant was charged with notice of the restriction as it in fact existed.

5. Where defendant had notice of a covenant binding his lot, prohibiting the erection of a building within five feet of complainant's line, a new deed procured by defendant from his vendor for the purpose of curing an alleged mistake as to such restriction in the original deed, reciting that the restriction only restrained the erection of the main wall of defendant's building nearer than five feet from the line, was ineffective to alter the original restriction.

On bill for injunction to restrain defendant from violating restriction contained in deed. Final hearing on pleadings and proofs.

Messrs. Thompson & Cole, for the complainant.

Messrs. Godfrey & Godfrey, for the defendant.

BERGEN, V. C.

Alfred C. McClellan was the owner of a lot of land fifty feet in width fronting on Pacific avenue, in the city of Atlantic City, and his wife Mary of a lot forty feet in width, adjoining on the west of her husband's lot. By their deed dated February 2d, 1904, in consideration of the sum of \$35,000, they conveyed to the complainant the husband's lot. On the same day an agreement was drawn, signed and acknowledged in due form by McClellan and his wife as parties of the first part, by the terms of which after, among other matters, reciting the conveyance to the complainant, and that one of the considerations of that purchase was that no building should at any time be erected nearer than five feet of the westerly line of the lot that day conveyed to complainant, the party of the first part, agreed that no building to

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be thereafter erected on the adjoining lot should be erected nearer than five feet from the westerly line of complainant's lot.

On September 1st, 1904, Mary A. McClellan and her husband conveyed her lot to the defendant. This deed contained the following stipulation,

"subject nevertheless to the condition and restriction that no building, or any part of a building, shall be erected within five feet of the easterly line of the above-described premises."

And on the 13th day of June, 1905, a deed was executed by the grantors last named to the defendant, which after reciting that the above restriction was inserted in the former deed by inadvertence and mistake, and declaring that it was not the purpose and intention to restrict the five feet mentioned as to the eaves, bay-window or similar projections of any building to be erected on said land, granted, conveyed, released and confirmed to the defendant the premises described in the former deed subject to the restriction "that the main wall of no building shall be erected within five feet of the easterly line of the above-described premises."

The defendant has so placed his building that the eaves and a bay-window occupy a part of the five feet which the complainant insists her agreement forbids, and this bill is filed to compel the defendant to remove these encumbrances.

The first point raised by the defendant is that the covenants in the contract restricting the use of the wife's land all run in the name of the husband, and cannot bind the wife, the owner of the property sought to be restricted, even if it was an effective agreement in other respects. As the agreement is the foundation of complainant's claim, this question must be first met and disposed of. The original contract has been put in evidence, and an examination of it shows that the draughtsman, at the time of its preparation, must have been under the impression that the title to the land sought to be restricted by the agreement was in the husband, and that he alone was to execute it, for the paper is typewritten, and the name of the wife, as a party of the first part interlined in ink, while other changes necessary to make the agreement conform to the change in the first clause were not

made, and the executed contract stands precisely as it was first drafted, with the exception that the name of the wife is inserted as one of the parties of the first part.

There was but one purpose sought to be accomplished by this agreement, and that was a covenant that the owner of the lot referred to in it would not erect on it any building nearer than five feet of the westerly line of the lot sold to the complainant, and it is a rule of construction that if the court, with knowledge of the situation in which the contracting parties stood at the time of executing the agreement, and with a full understanding of the force and import of the words, can ascertain the meaning and intention of the parties from the language of the instrument, it is its duty to determine the right of the parties in accordance therewith. *Culver v. Culver*, 39 N. J. Law (10 Vr.) 574.

The contract, in which the wife is one of the parties of the first part, recites that Alfred C. McClellan and Mary A., his wife, had conveyed to the complainant a lot of land fifty feet front, located at the northwesterly corner of Pacific and States avenues, and that one of the considerations which induced the complainant to purchase that lot was that no building should at any time thereafter be erected nearer than five feet of the westerly line of the lot so conveyed to her, and also that the party of the first part was the owner of the land immediately adjoining such westerly line for a distance of forty feet along Pacific avenue. Following these recitals,

"the party of the first part, for himself, his heirs and assigns, in consideration of the premises, and of the sum of one dollar, to him duly paid by the party of the second part, and also for the benefit of the land retained by him, as well as that conveyed as aforesaid, hereby covenants and agrees to and with the party of the second part, her heirs and assigns, that no building to be hereafter erected on the lot adjoining on the west the lot hereinabove and in said deed described shall be erected nearer than five feet from the westerly line of said described lot, and that said restriction shall attach to and run with the land, and bind all future owners of the lot immediately adjoining on the west to lands so as aforesaid conveyed; and the said Alfred C. McClellan, for himself and his heirs and assigns, covenants and agrees to and with the said Martha F. Wahl, her heirs and assigns, that he and they shall, in every deed of conveyance of said adjoining lot hereafter to be made by him, them, or any of them, insert and include a covenant, condition, agreement and restriction in all respects the same as the above."

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The reasonable interpretation of the agreement is that it was intended by the parties that the owner of the adjoining lot, the title to which was vested in the wife, should be bound as stipulated therein, and it is the duty of this court to give effect to that intention. The words, "himself, his heirs and assigns," cannot be permitted to overcome the intention of the parties, to be fairly gathered from the agreement, that the wife should be bound by its covenants, for if the contract admits of two inferences it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee. *Potter v. Berthelet*, 20 Fed. Rep. 240.

Certainly the complainant understood that the wife as owner was binding herself according to the terms of the agreement, and that it was the intention of the wife, as one of the parties to the agreement, to contract with reference to the land which she owned, is strengthened by the fact that otherwise no reason is apparent why she should be a party to a contract which had no purpose other than the placing of a restriction on her land for the benefit of the adjoining landowner in part consideration of the purchase price for the land sold by the husband and wife to complainant. The construction of an agreement should "be favorable, and as near the minds and apparent intents of the parties as it possibly may be and the law will permit." *Shep. Touch.* 85 ch. 5; *Sisson v. Donnelly*, 30 N. J. Law (7 Vr.) 432; *Rue v. Meirs*, 43 N. J. Eq. (16 Stew.) 377, 383.

I am satisfied that this written agreement is the contract of the wife, according to which there was not to be erected on her land any building within five feet of the westerly line of the lot conveyed by her and her husband to the complainant, a stipulation which the defendant has disregarded.

The next objection is that the contract is not binding on the wife because she was not the owner of the land, for the benefit of which the agreement was made, and also that it was without consideration. I take it to be well settled that equity will compel the observance of a covenant, founded upon a valuable consideration, by which the owner of land imposes upon it limitations as to its use which are reasonable in character, and shall hold that the wife, having an interest in both parcels, could legally impose

upon her land for the benefit of the land sold, the restriction contained in her agreement, if there was a valuable consideration to sustain it.

It appears by the testimony and the recitals in the agreement that the husband, by a deed in which the wife joined, had conveyed to the complainant a lot of land on which there was then erected a dwelling, the westerly side line of which, including the eaves of the building, extended to the boundary line between the lot conveyed and that owned by the wife, and for a part of the consideration paid, the wife and her husband agreed in a writing separate from the deed, executed at the same time and as a part of the transaction, that no building should be erected on the wife's lot within five feet of the westerly line of the lot conveyed to the complainant. The interest of the wife in the lands conveyed to the complainant was an inchoate dower which our courts have recognized to be a valuable interest. *Wheeler v. Kirtland*, 27 N. J. Eq. (12 C. E. Gr.) 534. It follows, therefore, that if the covenant which she entered into with the complainant tended to enhance the purchase price, and the presumption is that it did, her inchoate dower was increased in value thereby, and such increase undoubtedly is a sufficient consideration for the agreement sought to be enforced, and, in my judgment, if the wife was erecting the building complained of, it would be the duty of this court to require her to stand by her bargain.

If this agreement binds the wife, it will be enforced against any other person into whose hands the land passes, with notice of the covenants, although not recorded. The complainant insists that the defendant, before taking title to the land, had notice of the covenant, or sufficient notice thereof to put him on inquiry. The defendant testifies that on the day he agreed to purchase the lot he had an understanding with Mr. McClellan, who was acting for his wife in the negotiations of sale, that there was a restriction on five feet to the land, but was not told about it until he had paid \$100 on account of his contract of purchase. The pertinent evidence on this point is as follows:

"Q. You had an understanding about a restriction on the five feet?

"A. Yes.

"Q. When did you have that?

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"A. On the day I purchased the lot; let me see, it was after I had paid my first money.

"Q. After you paid your first money?

"A. Yes.

"Q. Then he told you that there would have to be a restriction?

"A. Mr. McClellan, after receiving my money and writing me a receipt, which I have brought here, came back to me and said, 'By the way, there is some little restriction on this lot; it is about five feet;' and he said, 'Of course, I don't suppose that you want to build closer than five feet;' I said to him, 'Mr. McClellan, I am a little surprised at this; if you had told me that before I paid you, we might have considered the matter a little differently,' but I said, 'However, I would like to know what these restrictions are, and whether they prevent me from building a bay-window;' he said, 'They do not; it is simply the five feet from Mr. Wahl's line to your house—that is, the body of your house or wall.'"

It further appears that at that time defendant knew that the complainant was in possession of the adjoining property, but did not go and see her with reference to this restriction. The defendant paid the consideration for his lot to a title company in Atlantic City, with the expectation that the company would get the deed and put it on record, which it did. This deed contained a restrictive covenant in the precise words of the agreement between Mrs. McClellan and the complainant, and is dated the 1st day of September, 1904. On the 13th day of June, 1905, Mary A. McClellan and her husband executed a new deed to the defendant reciting that the restrictive covenant was inserted in the original deed by "inadvertence and mistake," and contained a modification of the restriction in the words hereinbefore set out, but the later deed can have no effect upon this controversy if, as a matter of fact, the defendant, before he completed his purchase, knew, or was chargeable with notice, of the character of the contract between his vendor and the complainant. The recital in the second deed does not conform to the truth, because the vendor knew the character and nature of her covenant, and was careful to have it inserted in the earlier deed, and it is incredible that by "inadvertence and mistake" she inserted in her deed a covenant which she had so solemnly agreed to insert. Nor am I disposed to accept the statement of the defendant that the first deed as drawn and recorded did not conform to his understanding, for a long time after the deed came to his possession, and after he was aware of the nature of the restriction, he went

to the husband of the complainant and stated that he had gone to considerable expense preparing his plans and specifications, and found that there were restrictions covering five feet, which would require him to build nearer Pacific avenue than he wished to, and desired that the complainant should by deed relieve three feet of the five of the restriction, which he would hardly have done if he thought the restriction claimed to have been improperly inserted could be removed by the explanatory deed of his vendor, which he afterwards procured.

As to actual notice not proved by direct evidence, but to be inferred in part from circumstances, the rule is laid down in *Pom. Eq. Jur.* § 597 that if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate inference that he acquired the further information which constitutes actual notice. This inference is not a conclusive presumption of law. It may be defeated by proper evidence. Yet, if it appears that the party obtains knowledge or information of such facts which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute, for this is only another mode of stating that the party was put upon inquiry, that he made the inquiry and arrived at the truth. And the same result follows if the party has sufficient knowledge to require him to make the inquiry if he neglects to do it, or, having begun it, fails to prosecute it in a reasonable manner. The information need not be so full and detailed as to communicate a complete description of the opposing interest. It is sufficient if it asserts the existence of a right or interest as a fact. If a vendor informs the vendee that the subject-matter is subject to an outstanding lien or equitable claim, such information is sufficient. It need not state all the particulars or impart complete knowledge. It is enough if he has reasonable ground to believe that a conflicting right exists as a fact. Whenever the

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information given by the grantor would constitute notice, the same information communicated by the representative of the vendor will operate with equal force, provided the party represented was prevented by absence or disability from making the communication on his own behalf. To what extent the purchaser is charged with notice of the encumbrance and its character is regulated by the interest of the person making the communication. Information given by a third person having no interest in the matter, who, after stating the charge upon the subject-matter, also declares that it has been abandoned or no longer exists, the purchaser may generally rely upon the whole communication, and unless there is some special reason for believing the statement regarding the encumbrance and rejecting that which relates to its discharge, the purchaser may rely upon the whole statement. But a different rule prevails where the representation is made by the vendor or person parting with an interest in the subject-matter, and where such person admits some outstanding claim upon or equity in the property, his further declaration that the defect has been cured or the equity destroyed will not warrant the purchaser in relying upon this explanation or contradiction, for the informant is under a strong personal interest to misrepresent or conceal the real facts.

The testimony in this case shows that at the conclusion of the negotiations between the McClellans and the defendant he was informed by the vendor that there was some little restriction on the lot, covering above five feet, and the defendant testified that the vendor said, "Of course. I don't suppose that you want to build closer than five feet," to which the defendant replied that he would like to know what the restrictions were and whether they prevented him from building a bay-window, and was informed, "They do not; it is simply the five feet from Mr. Wahl's line to your house—that is, the body of your house or wall." In my judgment, it then became the duty of the defendant to inquire, from the person in whose favor the restriction was made, regarding its character and extent, and is chargeable with notice of all the facts which an inquiry, properly pursued, would have revealed. The defendant knew that the complainant was in possession of the adjoining lot; that there was a building standing

on that lot substantially on the boundary line between complainant's lot and the lot which the defendant was purchasing, and he knew that the restriction related to his right to build some part of his dwelling within five feet of complainant's line. This was sufficient information regarding a restriction or an equity in favor of the complainant attached to the vendor's title to charge him with the duty of inquiring regarding it from the person for whose benefit it had been created. In addition to this, I am not disposed to credit the testimony of the defendant that the vendor made the statement in the language used by defendant, for it is entirely at variance with the agreement imposing the restriction and as set out in the deed which was afterwards executed and delivered to the defendant.

I am satisfied from the evidence in this case that when the defendant purchased this lot he was informed by the vendor that the deed to him would contain a covenant preventing him from building upon his lot within five feet of the complainant's line, and that the deed to him originally made by the vendor contained the restrictive covenant precisely as he had understood it should. But if I am wrong about this, I am very clear that he had sufficient notice to put him upon inquiry, and that he is chargeable with the knowledge which he would have obtained if he had applied to the person in whose favor the restrictive contract was made, and that upon inquiry of the complainant—an inquiry, in my judgment, he was bound to make—the contents of the written agreement would have been disclosed to him. This case falls within the first rule laid down by Vice-Chancellor Wigram, in *Jones v. Smith*, 1 Hare 43, which is that where the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, the court binds him with constructive notice of facts and instruments, to the knowledge of which he would have been led by an inquiry relating to the charge, encumbrance or other circumstances affecting the property of which he has had notice. See, also, *Hoy v. Bramhall*, 19 N. J. Eq. (1 C. E. Gr.) 563.

The conclusion which I have reached is that the complainant is entitled to the relief prayed for in her bill of complaint, with costs, and I will so advise.

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MARY E. HEER, petitioner,

v.

HENRY HEER.

[Submitted March 7th, 1907. Decided March 8th, 1907.]

1. Evidence in a suit for divorce considered, and *held* sufficient to show a *bona fide* residence in the state by petitioner.
2. Evidence in a suit for divorce *held* sufficient to show desertion by husband.

On petition for divorce. On exceptions to master's report.*Messrs. Potts & Higgins*, for the exceptants.

BERGEN, V. C.

The report of the special master is adverse to the application of the petitioner for a divorce from the defendant upon the ground of desertion. The master reports that there is not "sufficient legal proof of the petitioner's *bona fides* in acquiring a residence in this state, nor is there sufficient proof of her *animus manendi*," and also that there is not sufficient proof as to the causes of the desertion, to which report the petitioner has filed exceptions.

The petitioner testifies that she and the defendant were married in 1891; that they lived together as husband and wife until the 16th day of March, 1903, when the defendant left her in their residence on Eighth street in New York City, where they had been living for eleven years, since which time he has not returned to her, nor contributed to her support; that immediately after the marriage petitioner returned to her father's home at 367 Eighth street, New York City, where she resided separate from her husband until the month of October, in the year 1892, when her husband rented rooms on Eighth street in

which they lived until the husband left, shortly after which she went to live with her sister in West Hoboken, New Jersey, spending part of the time with her sister and part of the time at her home in New York City, waiting before making up her mind what to do until her father, who was then a resident of West Hoboken, should return from Utica, where he was temporarily employed as a constructing engineer; that upon her father's return, which was about the 1st of June, 1903, he paid the rent for the rooms which she had occupied in New York City, and advised her to remove to West Hoboken, where he rented rooms for her near where her three sisters and brother lived, since which time she has continuously lived in West Hoboken in the rooms rented for her by her father; that the house which her father rented for her is at No. 925 Hoboken street, West Hoboken, and that her father lives with her part of the time and the other part of the time with her sister. She further testified that she did not remove to New Jersey with any idea of getting a divorce, and knew nothing about the divorce laws when she came here, but removed to New Jersey because she wanted to be where her father and sisters were; that she has one child, a son thirteen years of age, who lives with her. The father testified that when the defendant left the petitioner he was superintending the construction of a land digging machine for the Hayward Company in Utica; that he returned home about the 1st of June, 1903, and found his daughter, the petitioner, at her house on Eighth street; that he at once gave her \$100 to pay a mortgage on her furniture and

"told her to move her things over to New Jersey, where my other daughters live, and that I would hire a house for her and make my home with her there. She consented to this, and the very next day or two days afterwards she moved her things over to West Hoboken, New Jersey, to the place where we are now living. I think this was in June that she moved to New Jersey, and she has lived in New Jersey ever since that time. I had lived in New Jersey before this time with one of my other daughters. I have lived in New Jersey now for about four years. I know that I have voted three times here. I make my home first with one daughter and then with the other, except when I am away on business."

The petitioner removed to New Jersey about the 1st of June, 1903, and filed her petition in this cause September 29th, 1905,

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nearly four months after the statutory period of two years had elapsed. The master relies upon *Hunter v. Hunter*, 64 N. J. Eq. (19 Dick.) 277, as supporting his conclusion. But I am of opinion that the case referred to is not applicable to the facts presented in this cause. In the *Hunter Case* the petitioner remained a resident of New York for two years and a half after the separation, and filed her petition within two weeks after the expiration of the statutory period, which the court held was not sufficient to justify the inference that she had maintained such a residence in New Jersey as is necessary under our statute to give the court of chancery jurisdiction of her matrimonial status, and that her testimony, even if it had been more ample, would have required corroboration. In the case we are considering the petitioner removed to New Jersey very shortly after her husband left her, and it was natural that she should do so, her father and three sisters and her brother all living in West Hoboken. She was left alone in New York City, but took no step towards obtaining a residence in New Jersey until she had consulted her father, and acting on his advice she removed to this state in order to be near her sisters and where her father could live with her part of the time. Her testimony on this subject is corroborated by the father, and there is nothing in this evidence to justify the inference that the residence thus created was intended to be transient, or was established for the purpose of obtaining the benefit of a more liberal divorce law than existed in the foreign jurisdiction from which she removed. I am entirely satisfied from this evidence that the petitioner came to this state to make her residence near her relatives, and where her father might conveniently look after her interests, and the evidence on this point given by the petitioner and corroborated by the father does not, as was said by the court of errors and appeals in *Tracy v. Tracy*, 62 N. J. Eq. (17 Dick.) 807, "bear any intrinsic evidence of improbability," and, in my judgment, it is sufficient to establish the residence of the petitioner to be in this state.

On the question of the corroboration of the petitioner as to the causes of the desertion, I am of the opinion that she has made out her case. She testifies that for some time before her husband

left he was cruel and abusive; that he often said to her "you will not live until morning," and that "I will put a pill in the boy's mouth and will turn the gas on," and that she was so afraid of him that she had to watch him all the time. The father testifies that he had lived with the petitioner and the defendant in New York, but left about a year before the desertion; that the defendant had been arrested and sent to prison while he was living there, and after he was released he used such vulgar language and quarreled so about the house that he could not stand it and left them, and that he acted as if he did not care anything for his wife and child, from which we are justified in inferring that the defendant had lost all affection for his wife and child, and indicates a disposition towards them which would lead him to act as he did. The testimony of the wife shows that her husband had ceased to care for her and her child, a sufficient explanation of the reason why he left her as he did on the anniversary of their wedding with the remark, "I will say good-bye, and that is what I will give you for your wedding anniversary." There was no justifiable cause for his leaving his wife, but the cause which actuated the defendant, according to the testimony, was his loss of affection for his family and an indisposition to be further burdened with them. In this the wife is corroborated by the testimony of her father, not only as to his cruelty to his wife, but as to his determination to be rid of contributing towards their support, for petitioner's father met the defendant in Hoboken, New Jersey, in the month of August following the time when he deserted his wife, and defendant then told the father that he had just come back from Canada, and when the father said to him, "what is the matter you don't go home and take care of your wife and child," he replied, "I have got enough to do to take care of myself, and I don't want to have anything to do with them," and in further corroboration of the petitioner on this point is the testimony of her solicitor, which is, that after he had written a letter to a woman supposed to be acquainted with the defendant, the defendant called at his office in Jersey City, and when the solicitor said that his wife wanted some support from him, he replied that he would not support her and that "he

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didn't care to have anything to do with her, and she could do as she pleased."

In *Alward v. Alward*, 65 N. J. Eq. (20 Dick.) 28, the husband left his wife at the place of her residence as if to go to work and did not indicate by any word or act that he did not intend to return, and he was never heard of afterwards, upon proof made to the chancellor, that a search was made by the friends of both parties, which was conducted and persisted in in good faith for a reasonable time, the court held that the evidence justified the inference that the defendant was alive, and the case showing that the defendant was last seen in a locality in this state not far from his residence, in his ordinary condition of health, the further inference was justified that he was free and able to return to his wife if he desired to do so, and that his conduct and unexplained absence thereafter brought the case within the doctrine laid down in *Sergeant v. Sergeant*, 33 N. J. Eq. (6 Stew.) 204, to the effect that a husband, who had left his wife without any word or act indicating intent to desert her, was shown to have entertained that intent, by proof that he was alive and able to return to her if he chose, but that he had continuously remained away from her. In the case we are considering the defendant was seen in West Hoboken not far from where his wife lived where he had a conversation with her father in which he declined to go to her, or render her any assistance, and if he had any doubt about her place of residence he could easily have ascertained it by asking her father.

The desertion is abundantly proven, and the petitioner is entitled to a decree. It therefore follows that the exceptions must be sustained.

Reed v. Benzine-ated Soap Company.

72 Eq.

WILLIAM B. REED

v.

BENZINE-ATED SOAP COMPANY et al.

[Submitted March 5th, 1907. Decided March 8th, 1907.]

1. An answer by way of cross-bill, filed under chancery rule 206, is a pleading in the original cause, and costs taxed thereon are costs for which the solicitor filing a bill for a non-resident complainant is responsible, if the complainant has not given the security required by the statute.

2. The power to hold a solicitor for costs, when the complainant is a non-resident, is purely statutory, and will only be enforced where the complainant is required to give security, and if the right to such security is waived, as to the complainant, by the defendant, the waiver inures to the benefit of the solicitor.

3. If the defendant proceeds with the cause on his own behalf after obtaining an order requiring the complainant to give security, it amounts to a waiver of the right to security.

On application for order requiring solicitor to pay costs.

Mr. William T. Reed, for the applicant.

Mr. Thomas B. Hall, for the respondent.

BERGEN, V. C.

This is an application for a rule requiring the solicitor of the complainant to pay costs adjudged to the applicants, upon the ground that security for costs was not filed by the complainant, a non-resident, before the issuing of process, as required by section 8 of "An act respecting the court of chancery." *Rev. 1902; P. L. 1902 p. 540.*

The bill of complaint was filed February 25th, 1905, charging that the complainant was a stockholder and one of the officers of the defendant corporation; that complainant, Oliver Smith and Alfred Lowry constituted all the officers and stockholders of the corporation, and that the latter were undertaking to improperly

2 Buch.**Reed v. Benzine-ated Soap Company.**

dissolve the corporation, refusing complainant access to its books, and concealing from him the status of the company. The prayer was that Smith and Lowry should exhibit such books to the complainant, and, until they had done so, be restrained from further steps having for their object such dissolution.

The defendants answered, denying that they had refused complainant a proper examination of the books, or that the intention to dissolve was fraudulent, and charged that the company was largely involved, and that its business could not be conducted at a profit. The defendants then, answering by way of cross-bill, charged that they were induced by complainant to enter into a contract, under which the corporation was formed, by false representations made by the complainant as to the nature of the business intended to be carried on by the proposed company and the amount of profits to be made, with a prayer for process, and that the contract be declared void, the complainant's stock transferred to them, and that it be decreed that the complainant was not a stockholder.

No further proceedings were taken under the original bill, but the process prayed for under the cross-bill was duly issued and served upon the complainant, who has not answered. Thereupon, in due time, a decree *pro confesso* was entered against him and an order taken to bring on the hearing on the cross-bill *ex parte*, resulting in a decree for the defendants as prayed therein, and "that the complainant pay to the said cross-complainants the costs of this suit to be taxed." The answer and cross-bill were filed April 7th, 1905, and on May 9th following an order was made, on the application of the complainants in the cross-bill, requiring the complainant to file security for costs within ten days thereafter, "and that all proceedings in this cause be stayed until this order be complied with." The order never was complied with, notwithstanding which the complainants in the cross-bill proceeded thereunder to the final decree, as above mentioned. It was admitted by counsel that all of the costs now sought to be recovered were taxed on account of the proceedings under the cross-bill, and that the original cause remains undetermined, except so far as the decree on the cross-bill works that result.

The allowance of this order is resisted on several grounds, but it is only necessary to consider two of them, the first of which is that the complainant's solicitor is only responsible for the costs incurred in the suit brought by him, and that as a cross-bill is an affirmative act on the part of the defendants, in which proceeding no process is issued by the complainant, it is a separate proceeding not instituted by the solicitor on behalf of the complainant, and therefore the solicitor is only responsible to defendants for costs arising in the suit commenced for the complainant by the original bill on which process was issued. This objection has, in my judgment, no force under the practice established in this state. The statute of 1902 above referred to, section 87, makes it the duty of the chancellor from time to time to make such rules and orders to regulate practice and pleading as may, in his judgment, render the proceeding more efficient and simple, and prevent unnecessary costs and delay, and by virtue of that power the chancellor has, by rule 206, established the practice with relation to the use of a cross-bill as a pleading by way of answer. By that rule, when a defendant desires relief such as by the existing practice can only be obtained by a cross-bill, it is not necessary for him to file such bill, but he may set up in his answer the proper subject-matter of a cross-bill and obtain relief thereon. Of course, the matter set up by way of answer when affirmative relief is sought by the defendant must be the proper subject-matter of a cross-bill, but under this rule it is set up by way of answer. No process is necessary when, as in this case, the answer by way of cross-bill is exhibited against the complainant. It is to all intents and purposes an answer, and the liability for costs in such a case is cast upon the complainant, and if he be a non-resident, not having filed security, the solicitor who signed the original bill and issued the process for such non-resident complainant becomes responsible therefor under the statute. As was said in *Whyte v. Arthur*, 17 N. J. Eq. (2 C. E. Gr.) 521, an original and cross-cause in chancery are for many purposes considered as one suit and ordinarily heard together, and the rights of all the parties in respect to the matters litigated are settled by one decree.

The second objection is that even if the solicitor was origi-

2 Buch.Reed v. Benzine-ated Soap Company.

nally liable, the liability ceased when the defendants obtained the order of May 9th requiring the complainant to file security for costs within ten days and staying all proceedings until it was complied with, except the hearing of the motion for injunction, and directing that, on failure to file the security, application might be made to dismiss the bill of complaint, because the defendants, after the making of this order, did not stand upon it, but proceeded with the cause under their answer and cross-bill to a decree adjudging their rights thereunder. While the intention of the statute is not entirely clear, I interpret it to mean that if the solicitor of a non-resident complainant issues the initial process in the absence of a proper bond to secure the payment of costs, he assumes the liability, but that the defendant is not required to accept that indemnity, and may take proceedings to compel the complainant to execute a bond with sufficient surety, and prevent further proceedings on the part of the complainant until such bond be filed, and if not filed within the time appointed in the order, the bill shall be dismissed, with costs.

The power to hold a solicitor responsible for costs is purely statutory, and will only be enforced where the complainant can be required to give a bond, and if the right to security is waived as to the complainant by the defendant, the waiver inures to the benefit of the solicitor. The defendants in this cause declined the responsibility of the solicitor and obtained from this court an order that the complainant furnish security for costs, with a stay of all proceedings by him until the order was complied with. Under that order the complainant could not further prosecute his suit, and if the defendants, after obtaining the order, chose to proceed with their cross-bill, which I have held to be a pleading in the original cause, they took a step which amounted to a waiver of their right to security. In *Shuttleworth v. Dunlop*, 34 N. J. Eq. (7 Stew.) 488, Vice-Chancellor Van Fleet held that if a defendant takes any step in a cause after he has notice that the complainant is a non-resident he waives his right to security for costs, and this rule is not improperly extended if applied to a situation where the defendant has taken an order for security and by his subsequent act abandons the benefit thereof. In *Hay v. Power*, 2 Edw. Ch. 494, it was held that the

Steelman v. Wheaton.72 Eq.

setting down of a cause by the defendant was a waiver of an order for security, and if the defendant, after such an order, proceeds with his cause, he, in my judgment, waives the right to the security, and having abandoned his claim to such right against the complainant, the solicitor is absolved from any liability as surety.

My conclusion is that the statute only requires the solicitor in the case given to be responsible as surety for the complainant, and that if the defendant by his act relieves the complainant from furnishing security for costs, the suretyship of the solicitor ceases, for he is only made liable in case the complainant fails to furnish security to the defendant, a right which the defendant may manifestly waive, for I take it to be the reasonable interpretation of this act that if the complainant came in at any time and furnished the bond, the solicitor would be relieved, and where the defendant makes the giving of such bond unnecessary, the solicitor cannot be made responsible for a default of the complainant which, by the conduct of the defendant, ceases to be a default.

The application will be refused, with costs.

DANIEL STEELMAN, executor of Philip M. Wheaton,

v.

ARABELLA WHEATON.

[Submitted March 19th, 1907. Decided March 23d, 1907.]

1. Where the pertinent fact alleged in a bill of complaint as ground for relief raises a doubt as to complainant's right thereto, a general specification of want of equity in a motion to strike from the files the bill of complaint is sufficient.

2. Where an executor was to invest a sufficient sum to produce \$1,200 annually, which was to be paid to the annuitant during her natural life,

*2 Buch.**Steelman v. Wheaton.*

"in payments quarterly of three hundred dollars each," such bequest is an annuity.

3. Where an administrator *pendente lite* pays a legacy to a person entitled to it, which the character of his appointment does not authorize him to do, he will nevertheless be allowed such payment in his accounting, if the estate was able and liable to pay after all prior charges were provided for.

On motion to strike out bill of complaint.

Mr. Robert H. McCarter and *Mr. Herbert A. Drake*, for the complainant.

Mr. Gilbert Collins, for the defendant.

BERGEN, V. C.

The bill in this case seeks an injunction restraining the defendant from prosecuting her action at law for the recovery of the accrued portion of a bequest which appears in the last will and testament of her husband, in the following words:

"I hereby instruct, authorize and empower my executor, hereinafter named, as soon as it is convenient after my decease, to invest a sufficient sum or sums of money of my estate, with good and sufficient security, approved by the orphans court of the county in which this will is probated, which will bear twelve hundred (\$1,200) dollars interest annually; and this sum of twelve hundred (\$1,200) dollars I give and bequeath to my wife, Arabella Wheaton, during her natural life, and if she again does not marry, which sum of twelve hundred (\$1,200) dollars is to be paid annually to my said wife, by my executor, in payments quarterly of three hundred (\$300) dollars each, and upon her decease, or upon her again marrying, or upon my decease, if I should survive my said wife, I give and bequeath the sum or sums of money which my executor is authorized to invest for the use of my wife to my daughter, May Steelman, if she be living."

After the death of the testator this defendant filed a caveat against the probate of the will, and in proceedings had thereon in the orphans court the will was admitted to probate. From this decree she appealed to the prerogative court and to the court of errors and appeals, the result in each of the appellate courts being an affirmance of the decree of the orphans court. During

the pendency of the litigation an administrator *pendente lite* was appointed by the orphans court, and under an order made by that court he paid to the defendant her legacy or annuity of \$1,200 from the date of her husband's death; the whole amount paid by him up to the time the will was established amounted to \$4,600; since then three quarterly payments of \$300 each have accrued, to recover which the action at law now sought to be enjoined was brought. The complainant alleges that no part of the \$1,200 was payable to the defendant until the executor had qualified and invested an amount sufficient to produce it, and that as the delay in making the investment was caused by the litigation instituted by the defendant, she is not entitled to the payments made by the administrator, and that she is not now entitled to further payments until he has recouped out of the income due and to become due a sum sufficient to repay to the estate the sum of \$4,600 improperly obtained by her, and that in no event was she entitled to have her income run from the date of the testator's death. The residuary legatee has notified them that she will contest any further payments until the moneys, which she claims were improperly advanced to the defendant, have been recouped from such accruing income.

The defendant now moves to strike from the files the bill of complaint, alleging as a reason therefor a want of equity. Whether this motion should be allowed depends upon the interpretation to be given the bequeathing clause. The defendant insists that a proper construction of the will, as set up in the bill, does not warrant the granting of an injunctive order, and therefore the bill should be dismissed, this motion being, under our practice, a substitute for a demurrer. The complainant resists the motion on several grounds, the first being that, on a motion of this character, the notice should be as specific as is required in case of a demurrer, and that a notice to strike out, for want of equity, a bill filed by an executor for affirmative relief dependent upon the construction of the will under which he is acting, does not satisfy rule 209, which calls upon every demurrant to distinctly specify the grounds of a demurrer. The retention of complainant's bill depends upon the character of the bequest; if there is an annuity, the defendant has only received

2 Buch.Steelman v. Wheaton.

what she was entitled to, and the complainant would then have no standing in this court; on the other hand, if it is only a gift of the income for life of a principal sum to be invested, with remainder over, then the complainant has made a case entitling him to an answer, or, in default thereof, a decree upon *ex parte* proofs. It therefore follows that the only question to be met on this branch of the case is whether the clause in the will, upon which the complainant rests his case, entitles him to equitable relief. It seems to me that the question is clearly presented in the bill of complaint, for an inspection of it shows that the right to relief rests upon the interpretation of the material and only real element of dispute, which is the effect, when properly construed, of the clause of the will upon which the complainant founds his prayer for injunction. The defect is not latent or obscure, but the pertinent fact alleged in the bill as a ground for relief raises a doubt as to complainant's right thereto, and I am of opinion that the general specification of want of equity is sufficient to justify me in hearing this motion. *Essex Paper Co. v. Greacen*, 45 N. J. Eq. (18 Stew.) 504; *Parker v. Stevens*, 61 N. J. Eq. (16 Dick.) 163.

The second ground urged by the complainant in resisting this application is that the legacy is not an annuity payable from the death of the testator, but is a gift of the interest or income of a sum to be invested, making it an ordinary legacy, the income from which begins to run in favor of the legatee, only after the expiration of the year following testator's death, and as the administrator *pendente lite* has treated it as an annuity and paid the defendant accordingly, she has received \$1,200 more than she should, and ought not to be allowed to press her action at law until she has accounted therefor, or the complainant has received sufficient income, and returned it to the *corpus* of the estate, to liquidate the overpayment.

Whether this bequest is an annuity is the only question to be considered on this branch of the case. In *Booth v. Ammerman*, 4 Bradf. Surr. 129, an annuity is well described as follows: "An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount, varying according to the income or profits,

though a certain sum may be provided out of which it is to be payable." I am of the opinion that the bequest we are considering falls within this definition, for the executor is to invest a sufficient sum to produce \$1,200 annually, which is to be paid to the annuitant during her natural life "in payments quarterly of three hundred (\$300) dollars each." It is the gift of a fixed sum, not indeterminate in amount, or varying according to the income or profits, and if the amount set apart by the executor to produce this annual sum should for any reason fail to produce it, the residuary legatee would be required to provide the deficiency.

In *Craig v. Craig*, 3 Barb. Ch. 76, the gift to a wife was:

"I also give to her an annuity of \$1,600 per year, to be paid to her in semi-annual payments, the principal of such annuity to be invested in such manner as she may reasonably require."

In construing this language the court held that the annuity for the widow began to accrue at the testator's death.

In *Merritt v. Merritt*, 43 N. J. Eq. (16 Stew.) 11, the will ordered the executors to invest sufficient money to produce an annual income of \$1,000 for testator's son, to be paid in equal weekly payments. The amount invested proving insufficient, through changes in interest rates, to produce the required annual income, the deficiency was decreed to be paid by the residuary legatees, the court saying: "It was obviously the intention of the testator to provide and secure, out of his estate, an annuity of \$1,000."

In *Welsh v. Brown*, 43 N. J. Law (14 Vr.) 37, 43, Chief-Justice Depue said: "The distinction between an annuity pure and simple, which is to be paid at all events out of testator's estate, at the expense of the residuary legatee, and the interest or income for life of a certain sum set apart by the testator for that purpose, and given over in gross to another after the death of the life tenant, has been quite uniformly adhered to," citing with approval, from *Baker v. Baker*, 6 H. L. Cas. 623, the following portion of Lord Cranworth's opinion: "In all these cases arising upon the construction of wills the real question is whether that which is given is given as an annuity or is given

2 Buch.Steelman v. Wheaton.

as the interest of a fund, and where that question is to be considered, what you must look to is this: whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest or a portion of the interest of a capital sum which is to be set apart."

Turning to the will under consideration, there is no gift of the interest of a capital sum which is to be set apart. It is a gift of a sum which is annually to be paid out of testator's estate, and is not subject to any diminution resulting from a change in the rate of interest, the payment of taxes, or a failure from any reason of a particular fund to produce the amount.

The only case to which I have been referred as holding a contrary doctrine is that of *Cogswell, Executor, v. Cogswell*, 2 Edw. Ch. 231, but there the gift was to his executors in trust to set apart a sufficient sum to produce an annual income of \$1,000,

"and from time to time, as the same shall become payable, to permit my wife to take such interest moneys, in the whole amounting to the annual interest of one thousand dollars."

In interpreting this language the court held that "the gross sum to be set apart to produce the yearly income of one thousand dollars is considered in the light of a legacy, payable by law at the end of the year." It will be observed that in this case the testator fixes the time of payment of the gift to be when the interest or income arising from the investment provided for "shall become payable," and the court was of opinion that it was the plain meaning of the will that the widow was only entitled to such dividends as were declared after the expiration of the first year, and that as the gift depended upon the proceeds of an investment, to be made in stock, the executor might take one year for the purpose of making the investment, in analogy to the time allowed by law for paying legacies. I apprehend that in determining this cause Vice-Chancellor McCoun was influenced by the fact that it was not considered an absolute gift of \$1,000, to be paid in annual or at other fixed periods, but rather of interest moneys upon investments to be made, to be paid to the wife as the income from such investments became payable, for the authority upon which he relied in reaching his determina-

tion, viz., 1 *Rop. Leg.* 588, does not support the proposition that a gift of a stated sum, payable annually unless otherwise directed, without regard to the income or profits derived from the portion of testator's estate set aside by his executors to provide it, is not an annuity, for a reference to the authority cited declares:

"But if the disposition be of a sum of money, and the interest of it is given as an annuity to B for life, the first payment will not accrue before the expiration of the second year after the death of the testator,"

and the learned author undoubtedly means that the disposition shall be of a fixed sum upon which the interest is given, and not of a fixed amount to be paid without regard to the amount of the fund required to produce it. If the case just referred to is an authority sustaining a rule that the gift of a fixed sum, to be paid annually, is an ordinary legacy and not an annuity, because the executor is to invest a sufficient portion of the estate to provide for the annuity, without any direction as to the amount of the investment, then it is contrary to the weight of authority on this subject.

It was insisted on the argument that as the will directed the executor to invest a sufficient sum to raise the \$1,200 annually, the executor was not required to make the investment until the expiration of one year from testator's death. The answer to this contention is that the executor is only authorized to do what the law requires and permits him to do. He is always justified in setting apart immediately a fund sufficient to indemnify him against the payment of the annuity.

A further contention of the complainant is that, granting the bequest to be an annuity, nevertheless the defendant was improperly paid all that she received, because her opposition to the probate of the will was "unwarranted, dilatory and vexatious," and that by reason of such conduct the executor was prevented from making the investments required to provide the annuity. I am unable to discover any equitable reason for refusing to the defendant what she is entitled to under the will simply because she contested its probate to an unsuccessful issue. The estate was in the hands of an officer appointed by the court. The pre-

2 Buch.Steelman v. Wheaton.

sumption is that he did his duty and kept the money invested, and the contrary is not alleged. Therefore it could make no difference in the status of the estate whether the administrator or the executor collected the income, and I am aware of no equitable rule which visits upon an unsuccessful litigant the penalty of depriving him of that portion of the estate which the courts have determined he is entitled to, notwithstanding his unsuccessful claim that he was unfairly dealt with.

Whether the administrator *pendente lite* was justified in paying legacies is a question which cannot be determined in this suit. That is a matter of administration. The funds were placed in his hands by the orphans court to be administered by him as the law directs, and any improper misapplication of the funds committed to his charge must be adjusted in the settlement of his accounts in that court. If this defendant was entitled to the money it would have to be paid to her by the present executor, and the fact that it may have been paid to her by the administrator *pendente lite* works no injury to the parties interested therein which calls upon a court of equity to interfere, for such an administrator, even if he pays a legacy which the character of his appointment does not authorize him to do, will nevertheless be allowed such payment in his accounting, provided the party who received it was entitled to it, and the estate able and liable to make the same after all prior charges are provided for.

The result which I have reached is that the bill of complaint presents no equity as against this defendant, and the motion should prevail.

Atlantic City v. Associated Realities Corporation.

72 Eq.

ATLANTIC CITY

v.

ASSOCIATED REALITIES CORPORATION.

[Argued and decided March 25th, 1907.]

Where grantors of a shore front at a summer resort reserved the right to build a pier, covenanting not to permit the sale of commodities thereon, and to charge only an entrance fee, their covenant is not broken by charging for the use of roller skates at a rink on the pier, where all who pay the entrance fee may go to every part of the pier, including the rink.

On final hearing on pleadings and proofs.

Messrs. Godfrey & Godfrey, Mr. Harry Wootton and Mr. James E. Howell, for the complainant.

Messrs. Thompson & Cole, for the defendant.

BERGEN, V. C.

I will dispose of this matter now. It appears that the grantors, or the predecessors in title of this defendant, were the owners of a shore front extending southerly from the boardwalk at Atlantic City, and that they made a deed to the city of Atlantic City, referred to here as the "Easement Deed," for the purpose, as I read it, of conveying to the city of Atlantic City practically the control and substantial ownership of all the shore front, reserving, however, to the grantors a right to build a pier on the property conveyed, and to connect it with the boardwalk, upon condition that the pier should be at least one thousand feet in length and constructed of iron or steel, and upon the further condition that they should not permit the sale of any commodities upon the pier, "and be confined to charging only an entrance fee."

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What this defendant is doing, as appears from the evidence produced before me, is to charge an entrance fee of ten cents to their pier, which has a portion of it devoted to roller skating, but, as I understand from the evidence, no person having paid an entrance fee is prohibited from going into this part of the pier; there is a walk or promenade around the room, with galleries from which a view of the floor and of the persons skating may be had, open to everybody, and the skating floor itself is open to everybody willing to take the chance of keeping out of the way of the persons skating. It appears that the witnesses brought here to substantiate the complaint, after paying the entrance fee of ten cents, applied for a pair of skates. They made no application for admission to the room or part of the building used for skaters—that was open to all for the entrance fee paid for admission to the pier—they merely asked for the use of a pair of skates, and were told that to get a pair of skates they must go back to the booth at the entrance and get other tickets. I think it makes no difference where they were sent to get the tickets for the skates, or where they were sent to get the skates. That is a convenient method of accounting which the owner adopts. If you want to gain an entrance on the pier you will have to pay ten cents; if you want a pair of skates then you will have to get a ticket, and you will have to deliver that ticket to the man who has charge of the skates, and you may hire the skates for an additional twenty cents, for which two tickets are given, one for checking garments, another for the skates, and does not seem to me to be a violation of the covenant to charge only an entrance fee, for a covenant must be reasonably interpreted, and the covenant confining the charge to “only an entrance fee” means a charge for admission to all parts of the pier, and, in my judgment, is not applicable to a charge for an appliance to enhance the visitor’s enjoyment of the pier. They are not undertaking to sell anything or to prevent any person from admission to all parts of the pier; they merely say, that if you want an opportunity to skate we will provide skates, but you must pay for that convenience. Under these conditions I do not think we are justified in holding that there has been a violation of this covenant, because the people keep on this pier skates which they

furnish on application to anyone desiring to use them, providing he is willing to pay for such use. Vice-Chancellor Reed construed a similar covenant in *Atlantic City v. Atlantic City Steel Pier Co.*, 62 N. J. Eq. (17 Dick.) 141, in which he said: "Reading the entire clause, not merely that part directed against the sale of commodities, but including the limitation in respect to what should be charged, the natural construction of the agreement seems to me to be that any additional charge for admission to any part of the pier, after the payment of the entrance fee, conflicts with the restriction which the grantors imposed upon themselves, namely, that they should be confined to charging only an entrance fee."

This defendant charged an entrance fee of ten cents, and each one of these witnesses testify that upon paying an entrance fee they received a ticket which they surrendered for admission to the pier. They were free to go anywhere on the pier, and were not shut out from the skating floor. When they came to the man in charge of the skates and applied to him for them, in order to join in the skating, they were told that they would have to procure another ticket. Of course, the owner of the place could not be expected to furnish skates for everyone; that is not a part of the original plan, nor is it contemplated when the entrance fee is paid. The entrance fee entitles a person to go on the pier; when you have paid that you are entitled to go on the pier, to go on every part of it; it entitles you to hear the music, and everything that is provided for the amusement and entertainment of the public who attend and pay an entrance fee. Hiring a pair of skates for a limited period to a person going on to the pier hardly falls within the description of a sale of "any commodities," nor can it be said to be a charge of an additional entrance fee. This is my construction of this covenant, and it is not in conflict with the case which has been referred to by counsel, which is supposed by them to take a different view of the covenant. I do not consider that that case establishes a different rule, for I understand it to hold only that the fee charged for entrance to this pier entitles one to go to any part of it and to see and hear all that may interest them. These witnesses who paid the entrance fee were entitled to that, but they wanted more,

2 Buch.Olden v. Sassman.

they wanted to participate in the skating. The owner of this place keeps skates, and if you want him to provide you with skates, then you must pay for their use. You are not compelled to skate, and, if you do not, you are not deprived of anything that the entrance fee, which you paid to get on the pier, entitles you to have. Being of this view, I think the bill ought to be dismissed.

CHARLES H. OLDEN

v.

URIAH SASSMAN.

[Submitted March 26th, 1907. Decided April 3d, 1907.]

1. Where no levy is made under a writ of execution before its return, power to perfect the lien of the writ is lost, and any personalty not levied upon before such return may be subjected to a subsequent judgment creditor's execution.

2. A sheriff's levy upon personalty particularly described, "and all other goods and chattels belonging to" defendant, did not cover a leasehold interest not part of the personalty particularly described, the officer who executed the writ not knowing of the property until he was asked to and did levy upon it under another writ after power to levy under the first writ had expired, and hence the subsequent execution creditor was entitled to the proceeds of the sale of the leasehold interest.

On application for an order directing the application of moneys raised by the sheriff from the sale of defendant's property under an execution in favor of complainant.

Mr. John T. Bird, for the applicant.

Mr. Edwin Robert Walker, for the respondent.

BERGEN, V. C.

The sheriff of the county of Mercer had delivered to him November 20th, 1906, an execution issued out of the Mercer

county circuit court in favor of Charles H. Mather against the defendant. By virtue of this execution the sheriff on the same day levied upon certain personal property, a particular inventory of which is attached to the writ, and concludes as follows: "all other goods and chattels belonging to Newton Uriah Sassman." This writ was returnable to the January Term, 1907, of the Mercer county circuit court, which opened on the third Tuesday in January, which in the year 1907 fell on the 15th day of the month.

On December 29th, 1906, a writ of execution was issued out of this court in favor of the complainant and against the defendant, returnable to the February Term, 1907, which opened on the first Tuesday of the month. This execution was delivered to the sheriff of Mercer county on January 2d, 1907, and on the same day the sheriff levied upon the same personal property which was subject to the levy already made by him by virtue of the execution placed in his hands in favor of Mather, but on the 16th day of January, 1907, the sheriff made an additional levy upon the leasehold interest of Sassman in and to certain real estate in the county of Mercer. This levy was made after the return of the Mather writ, and unless the chattel interest is included in the closing words of the sheriff's levy in the Mather case it was not levied upon by the sheriff under that writ, because on the 16th day of January, the Mather writ having been returned on the previous day, the sheriff's power to further execute it by an additional levy was exhausted. The complainant proceeded with the execution of his writ, and under it the sheriff sold to the complainant whatever rights the defendant had under the lease for the sum of \$1,200. The complainant now asks to have the purchase price, less the sheriff's costs and expenses, applied towards the satisfaction of his writ, which application Mather resists, claiming that as his writ of execution was placed in the sheriff's hands prior to that of the complainant, it bound all the chattel interest and personal property of the defendant from the time it was delivered to the sheriff, and as such delivery preceded that of the complainant, he is entitled to have the money realized applied towards the liquidation of his writ, insisting—*first*, that even if no actual levy had been made

2 Buch.Olden v. Sassman.

on the disputed property, nevertheless all the personal estate was made subject to his writ from the moment it reached the sheriff's hands, and *second*, that the concluding clause in the sheriff's levy is a sufficient levy upon all personal property, without a particular statement or inventory.

In support of the first proposition, counsel for Mather relies upon *Evans v. Walsh*, 41 N. J. Law (12 Vr.) 281, but this case does not go to the extent claimed by counsel, it only determines that the delivery of the writ binds the personal property from that time until its return day, and that the officer holding the writ may levy at any time during that period upon defendant's property, and that a subsequent execution issued during that period, under which a particular levy is made, does not acquire priority during the life of the previous writ, for under it the sheriff may, at any time before the return day, levy upon defendant's property, and the levy becomes binding from the time the writ was delivered to the sheriff. The language of Mr. Justice Van Syckel, in delivering the opinion of the court in the *Evans Case*, is: "The lien acquired by the delivery is inchoate, and becomes perfected by actual levy. If no levy is made before the return of the writ, the goods of the defendant are free from its burden, either in the hands of a purchaser with notice or as to subsequent execution creditors. But if the levy is made, the lien dates from the delivery of the writ, so as to maintain its rank against all intermediate encumbrances. Therefore no such title vests in the sheriff by a mere delivery of the writ as will maintain trover, for it may be that he will not pursue and perfect his right by making a levy, but when the levy is duly made, the writ binds the property by the doctrine of relation from its delivery."

In the case which we are considering the sheriff had the right, at any time before the return of the writ, to levy on the property in dispute to satisfy the prior execution, and in my judgment the lien of the writ must be perfected before its return by a levy, and therefore if no levy was made by the sheriff under the Mather writ before its return, his power to perfect the lien was gone, and any personal property not levied upon before the return of the writ might be disposed of to a purchaser with

notice, or subjected to the execution of a subsequent judgment creditor.

The next question to be considered is whether the disputed property, which was sold under complainant's execution, was levied upon by the sheriff under the Mather writ by the words contained in this levy, "all other goods and chattels belonging" to the defendant, for it is admitted that although the sheriff made a very detailed and particular levy, the property sold under the complainant's execution is not specially mentioned, and if subject to the writ it is only because the expression "all other goods and chattels" includes it. I am of opinion that it does not. The deputy sheriff who executed this writ was produced as a witness, and testifies that at the time the levy was made under the first writ, and even when the first levy was made under the second writ on January 2d, 1907, he had no knowledge of the special property which he levied upon under the complainant's writ on the 26th day of January, on which date it was brought to his attention by the counsel of the complainant, with request that he levy upon it, and that he did so.

It was held by Vice-Chancellor Pitney, in *Nelson v. Van GAZELLE*, 45 N. J. Eq. (18 Stew.) 594, 597, that in order to make a valid levy on chattels the officer having the writ must do some act in relation to them in the way of taking actual possession or asserting dominion over them, and in *Lloyd v. Wyckoff*, 11 N. J. Law (6 Halst.) 218, Mr. Justice Ford said that it was a well-established principle that if an officer receiving an execution makes a just and true inventory of the debtor's goods, and files it at the return of the writ, it amounts to a constructive seizure, and in this case, while the officer could not see or perhaps actually seize the chattel interest, an inventory of it attached to the writ before its return would amount to a constructive seizure. That was done under the complainant's writ, it was not done under the Mather writ, and in the case last cited the entry in the sealing docket was, "levied on the goods and chattels of the defendant to the value of \$5," regarding which Judge Ford said: "This does not specify one item for which the judgment creditor could recover value in case it was lost, consumed, embezzled or wasted. There is no evidence to the

2 Buch.Olden v. Sassman.

debtor of what goods were taken away, nor to the creditors of what goods were left for them. * * * It is not that inventory which, in the decisions of the court (conformably to the meaning of the statute), has been recognized and established as a constructive seizure. They have allowed great efficacy to such an inventory as the statute requires to be made. They have allowed it to avail an officer as much as actual seizure would have availed him, but if he does not comply with the statute, he must show an actual seizure."

Again, in *Watson v. Hoel*, 1 N. J. Law (Coxe) 136, the sheriff, instead of endorsing a particular inventory of the articles upon which he had levied, had recited a levy upon one or two specified articles of property, and added, "and upon all the household goods," &c. This the court held not to be a sufficient levy to protect the sheriff from amercement, and was held to be a direct breach of his duty.

Mr. Justice Drake, in *Lloyd v. Wyckoff*, *supra*, said: "The duty of the sheriff to the plaintiff requires that he should make a sufficient levy, and his duty to the defendant as strongly requires that he should not make an oppressive levy. He ought then, for both these purposes, to have the means of knowing the value of the goods he levies on. He must make the money of the goods and chattels levied on, and he must have them to show to purchasers at the sale, and to deliver when sold. * * * The sheriff should know exactly what he has levied on, and be able to furnish information to parties interested. For this purpose, whenever the sheriff does not take and keep the goods and chattels levied on in his immediate possession, he should take a true list or inventory of them. From what has been said, the requisites to a good levy, in all ordinary cases, may safely be laid down to be—*first*, that the officer should see the goods and have them in his power, and *secondly*, that he should, in addition to this, do some act demonstrating his intention from that time forward to appropriate them in obedience to the commands of his writ."

In the present case, for aught that appears, the goods and chattels actually levied upon by the sheriff under the Mather execution may be more than sufficient to satisfy that writ, and

Attorney-General v. Clavin.72 Eq.

the sheriff may have intended not to levy on more property, because to have done so would have been oppressive. I am satisfied from the testimony taken in this case that the sheriff returned the Mather writ without intending to, or in law effectively levying upon the property afterwards particularly levied upon and sold under complainant's writ; that the power to take further proceedings under the Mather writ expired on the 15th day of January last, and that thereafter the complainant discovered property not included in the levy under the Mather writ, and procured the sheriff to levy upon it under his writ, and that he is entitled to the proceeds of the sale of this special property.

ROBERT H. McCARTER, attorney-general of New Jersey,

v.

MARY CLAVIN, individually and as administratrix of the estate
of John W. Russell.

[Decided April 4th, 1907.]

Sufficient ground is shown for the appointment of a receiver to protect decedent's real property, worth \$100,000, claimed by the state to escheat, and also claimed by defendant under an alleged will and by another claiming to be decedent's only heir-at-law, the lands having been sold for municipal taxes, the rents being collected by the purchasers at the tax sale, a mortgagor having filed foreclosure proceedings, defendant as administratrix having in no way attempted to protect the property, and it appearing that the conflicting claims will produce prolonged litigation.

On bill for receiver.

Mr. Robert H. McCarter, attorney-general, for the complainant.

Messrs. Raymond, Van Blarcom & Anthony, for the defendant.

*2 Buch.**Attorney-General v. Clavin.*

BERGEN, V. C.

On November 28th, 1905, John W. Russell departed this life seized of certain real estate in the city of East Orange, New Jersey, and at that time he was not supposed to leave any known relatives. The defendant, Mary Clavin, who had lived with him as a servant, claiming to be a creditor, made application for letters of administration, which were issued to her, it being supposed that Russell had died intestate. The real estate consisted of four tracts or parcels known as Nos. 15, 19, 21 and 23 South Maple avenue, East Orange, and he left also a small amount of personal property. Three of the four lots were improved and are occupied by tenants who are paying no rent for the reason that no one is now empowered to collect rents. One of the lots is subject to a mortgage for \$8,000 upon which interest is in arrears and upon which the taxes for two years have remained unpaid, and the municipal authorities, to enforce the payment of taxes, have sold the lands, and the rents since such tax sale have been collected or claimed by the purchasers at that sale. It also appears that the holder of the mortgage security has instituted foreclosure proceedings, and that as to one lot the property is likely to be absolutely lost to the owner.

Since the granting of administration to the defendant of the personal estate, a paper-writing has been recently produced purporting to be a last will and testament of Russell, which has been offered for probate, and probably would have been probated except for a caveat filed on behalf of the State of New Jersey, and another filed on behalf of Mary Ellen Hyde, who claims that she is the only heir-at-law of the decedent.

The bill of complaint charges that Russell died intestate and left no heirs-at-law, so that the property will escheat to the state, and claims on behalf of the state that the paper offered for probate is not the last will and testament of the decedent, and that Mary Ellen Hyde is not the heir-at-law. The alleged will devises all of this valuable property, estimated to be worth \$100,000, to the defendant, and it is quite apparent that the questions involved, and the great value of the property, will produce a litigation likely to cover a considerable period, and it is upon this ground that the complainant files this bill asking that a receiver

of the real estate be appointed to hold the property during the litigation, with power to collect the rents and to pay off and discharge taxes, interest and any other proper lien, the removal of which may become necessary in order to preserve the property for the owner when ascertained, and also that the defendant may be restrained by a writ of injunction from interfering with the real estate or with the possession, care or custody of the receiver when appointed.

The situation briefly stated is this: The deceased died seized of real estate estimated to be worth \$100,000. At the time of his death it was not known that he had any relatives; the defendant, being appointed administratrix of the personal estate, has not in any way attempted to protect the real property, and in consequence of the want of an owner, or any person representing an owner, the property has all been sold for taxes and purchased by persons who are now taking, or claiming the right to take, all of the rents from this valuable property without offering to protect it from a foreclosure sale, and equity would seem to require that a receiver should be appointed to protect the property from loss, and to hold it for the benefit of those to whom it may be finally determined it belongs.

The counsel for the defendant appeared, and without seriously denying the facts stated, insisted that this court was without power to appoint a receiver, but I am of opinion that such power does exist, and will make an order to that effect.

Under the title "Cases in which a receiver may be appointed" (*Pom. Eq. Jur.* § 1332), the third subdivision of the first class of cases in which receivers may be appointed is declared to be "estates of decedents." During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate where there is any danger of their loss, misuse or misapplication.

In the present instance there is a controversy over the admission of the alleged will to probate; there is a contest over the question whether the party claiming to be the only heir is such; the property is in great danger of loss owing to tax sales and

2 Buch.**Goodnow v. American Writing Paper Co.**

threatened foreclosure. It is clear that in the absence of an heir, in the absence of an executor or of any lawful appointee entitled to hold the property together, it will be lost, and in any event the rents and profits will be misapplied. It appears to me that if there ever was a case in which the rule I have referred to ought to be applied it is in this case, otherwise a vast amount of property that may belong to the state will, for want of protection, be swept away and pass, without practical consideration, into the hands of strangers to the decedents.

The course which I am adopting is justified, in my judgment, by *Flagler v. Blunt*, 32 N. J. Eq. (5 Stew.) 518, in which the learned chancellor (at p. 523), speaking of this very question, quoted from *High Rec.* §§ 9, 11, as follows:

"The principal ground upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite* are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed."

A receiver will be appointed and the injunction allowed as prayed for in the bill of complaint.

WILLIAM NELSON GOODNOW

v.

AMERICAN WRITING PAPER COMPANY.

[Submitted April 15th, 1907. Decided April 17th, 1907.]

1. The owners of a number of paper mills combined and sold all of their properties to a newly-organized company, taking in exchange therefor, besides certain bonds, all of the preferred and common stock of the new company at an admitted overvaluation. The new organization was prosperous, had no debts, and earned annually large sums of money in excess of the amounts advanced to produce and sell its output. It de-

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clared a dividend on the preferred stock, payable out of such annual earnings, and some of its stockholders sought to enjoin the payment of the dividends, upon the ground that there could be no surplus or net profits until the amount of the overvaluation had been earned and the impairment of the capital stock resulting from such overvaluation extinguished.—*Held*, that as between the stockholders, no fraud being charged, the agreement to issue the stock as full paid for property purchased was binding upon the company and its shareholders, and that the stock so issued is not subject to further call, either directly or indirectly, by suppression of dividends declarable from annual net profits, and that if all of the assets for which the stock was issued still remain in the possession of the company, or, if exhausted, replaced, in kind or with money, a dividend ascertained by reserving for capital the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation.

2. A contract between the company and its stockholders that the stock issued to them as full paid, and not subject to further call, is, in the absence of fraud affecting other shareholders, binding upon the company and its stockholders, although subject to attack by creditors.

On bill for injunction. On demurrer.

Mr. William H. Corbin, for the complainant.

Mr. Richard V. Lindabury, for the defendant.

BERGEN, V. C.

The complainant seeks to enjoin the payment of a dividend on stock issued for property purchased upon the ground that the property being overvalued there can be no net profits or surplus from which dividends can be paid, unless the impairment of the capital, caused by the overvaluation, has been supplied, and until that is done the payment of dividends from "the surplus or from the net profits arising from its business," as provided in section 30 of our Corporation act as amended (*P. L. 1904 p. 275*), is a division, withdrawal or payment to stockholders by the corporation of a part of its capital stock.

The bill charges that the owners of certain paper mills, twenty-eight in number, sold to the corporation their respective properties, and took in payment bonds of the defendant company for \$17,000,000, preferred stock for \$12,500,000 and common stock for \$11,500,000, being all of the preferred and common stock

*2 Buch.**Goodnow v. American Writing Paper Co.*

issued by the company. The bill does not disclose in what manner the securities were divided among the respective vendors, but it is fair to assume from the manner of sale, and the manifest object of the parties, that the prices for the respective properties were agreed upon by all of the vendors, and distribution made accordingly, for the bill charges no fraud, concealment or misrepresentation by any of the parties to the transaction. It admits that the company has no debts; that all of its current obligations incurred in the management of its business are met at maturity; that the affairs of the defendant corporation are well managed; that it is in receipt of large profits annually over and above the advancements made for producing its products and conducting the business; that the net earnings for eighteen months prior to the 1st of July, 1906, exceeds \$100,000, out of which it is proposed to distribute as dividends on the preferred stock \$125,000, but charges that the amount paid for good will, patents and trade marks exceeds by \$11,000,000 their value, which it is insisted shall be made up from earnings before any dividend can be paid, although all of the parties to the original transaction knew that the stock was issued to each shareholder as full paid for property purchased. The correctness of the complainant's contention is challenged by a demurrer, which confesses the truth of the allegation that the stock was issued for property at an overvaluation, and that the company did not receive for its stock money, or money's worth, in other words, the stock was "watered" to the extent of \$11,000,000.

As the bill admits that there are no unsecured creditors, their rights are eliminated from present consideration, and the effect upon creditors of overvaluation of property purchased will not be considered, the only question intended to be determined is, whether, under the conditions set up in the bill of complaint, the payment of the proposed dividend out of the admitted net earnings arising from the conduct of the business is, as between stockholders, a division of any part of the "capital stock paid in," it being admitted that the corporation still owns the identical property taken for the stock, there having been no disposition of the specific property except where the value has been restored from the earnings.

The defendant insists a contract was entered into between the owners of the property and the company, under which the stock was issued as full paid in consideration of the property, with full knowledge by each of the parties of the values agreed upon as a support to the stock. I have no doubt that such a contract is binding upon the parties until set aside, because of fraud in its inception, or for some other legal reason. It does not distinctly appear whether or not the complainant was one of the original parties to the contract, but he charges no fraud or misrepresentation, as an inducement to purchase, on the part of his transferor, nor does he assert that he did not know the facts he now sets up when he became the owner of the stock.

The bill charges that the stock was all issued for property purchased, but not that the complainant acquired his stock by purchase, or otherwise than on account of property sold the corporation. and the presumption is that he received his stock with other shareholders in payment for the very property which he now claims was overvalued. He participated in the transaction, reaped its benefits, and is not in a position to claim that the good will bought, to his knowledge, with the stock of which he holds a part was overvalued. *Washburn v. National Paper Co.*, 81 Fed. Rep. 17, 21.

That a contract between the company and its stockholder that the stock issued to him is full paid and not subject to further call, is, in the absence of fraud affecting other shareholders, binding upon the company and its stockholders, was declared by Chancellor McGill, in *Heberd v. Southwestern Land and Cattle Co.*, 55 N. J. Eq. (10 Dick.) 18, 31, where a stock bonus was given to purchasers of bonds of the company, the learned chancellor holding "such a contract is binding upon the company and its shareholders, but as the capital stock constitutes a trust fund for the payment of debts, it cannot be given away from the demands of creditors."

In 10 Cyc. 467 the rule is stated to be that a contract between the company and the shareholder, that his stock shall be issued in payment of property at an overvaluation is valid, though not binding on creditors, a conclusion which is supported by *Scovill v. Thayer*, 105 U. S. 143.

2 Buch.Goodnow v. American Writing Paper Co.

In *Krohn v. Williamson*, 62 Fed. Rep. 869, 875, there was an agreement that the completion of a bridge, the acquisition of a right of way, and the possession and enjoyment of certain franchises and privileges should be considered a full payment of \$1,500,000 of the capital stock justifying its issue as full-paid stock. In upholding this contract Judge Taft said: "Such an agreement as between the company and its stockholders was entirely valid, however subject to attack by creditors it might be."

The rule seems to be established that between stockholders one cannot be legally called upon to make good any shortage in value between assets and the nominal par value of the stock, when his stock is issued under a contract with the company as full paid, whether as a bonus or for property at an overvaluation, when the issue is consented to by all the stockholders. It is a bargain between the contracting parties, which, in the absence of fraud, they cannot abrogate. They may let in one to participate in dividends, and thus reduce what they would have on that account, and decrease their share of the assets on final distribution, but they are dealing with their own property, and so long as they do not divide any part of the paid-in capital, they may contract to apportion dividends, properly payable, and also the assets, among as many as they choose, subject to the rights of creditors. The policy of our act is to preserve intact for all stockholders the actual capital assets, that a stockholder may not unknowingly exhaust his principal fund, but if with knowledge the stockholders of the company contract, even for an insufficient consideration as against creditors, that another may have an interest in its property, it is bound by its contract until it is in some lawful way set aside, and if, when they so contract they are bound, and cannot call upon a stockholder to make good his stock issued full paid in payment for property overvalued, it cannot be that it can withhold his dividend or share of the net profits of the business for such purpose, and thus accomplish by indirection what cannot be done by a direct proceeding.

Stockholders may agree as to the amount of capital to be paid in, and between them this agreement would be binding, and a further call, except in the event of insolvency, and the need of unpaid subscriptions to pay debts, could not be enforced, nor

would the company be prohibited from paying dividends out of net earnings until a sinking fund had been created sufficient to supply the unpaid subscriptions. The unpaid subscriptions, under such an agreement, would not represent a debt due the corporation that could be enforced, except in aid of creditors.

A number of English cases were cited on the argument, and while none of them related to the issue of stock for property at an overvaluation, they uniformly hold that where the tangible assets with which a corporation starts business, and for which its stock was issued remain, and are in the condition they were when taken over for stock issued, neither depreciation in value nor a waste caused by mining and selling the product is a reason for holding that dividends declared out of the profits of the business, arising from the sale of a product which will ultimately exhaust the capital asset, is a distribution of the capital. *Lee v. Neuchatel Asphalt Co., L. R. 41 Ch. Div. 1 (1889).*

After a careful consideration of the questions involved, I am of opinion that as between these stockholders, no actual fraud being charged, the agreement to issue the stock as full paid for property purchased, the agreement having been carried out, is binding upon the company and its shareholders, and that the stock so issued is not subject to further call, either directly or indirectly, by suppression of dividends declarable from annual net profits, and that if all of the assets for which the stock was issued still remain in the possession of the company, or such of them as may have been exhausted replaced, either in kind or with money, to the extent of their real value, a dividend ascertained by reserving for capital the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation, forbidden by our act.

As was said by Judge Showalter, in *Northern Trust Co. v. Columbia Straw Paper Co., 75 Fed. Rep. 936, 937*: "Whatever may have been in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. Neither any person then holding stock, nor any person who afterwards became a stockholder by assignment from

2 Buch.Wood v. Lembcke.

one who then held stock, can now make complaint, on behalf of the corporation, as against the fairness of that transaction. This I take to be the settled law on that subject." This case was affirmed (C. C. A.) 80 Fed. Rep. 450.

I will advise that the demurrer be sustained.

ORLANDO WOOD, executor of the last will and testament of
Almira L. Wood, deceased, et al.,

v.

MARIA LEMBCKE and THEODORE LEMBCKE.

[Submitted May 1st, 1907. Decided May 9th, 1907.]

A testatrix, after appointing an executor, directed the payment of her debts, and then blended her real and personal estate, giving to four children each one-sixth; to another child, one-sixth, less \$800, charged as an advancement, and the remainder to the executor in trust for another child.—*Held*, that the executor had authority to convey real estate, since to make the division and establish the trust a sale of the real estate was necessary.

On bill for specific performance.

Mr. Willard P. Voorhees, for the complainants.

Mr. W. Edwin Florance, for the defendants.

BERGEN, V. C.

The last will and testament of Almira Wood, deceased, after appointing her son Orlando Wood executor, and directing that all of her debts be paid, reads as follows:

"*Third*. I give and bequeath unto my six children as follows: John E. Wood, Orlando Wood, Philip H. Wood and Almira M. Dunham each to have and to hold one-sixth part, equally each, of all that I may die pos-

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sessed, either real or personal; as to the remainder, having advanced Ambrose Wood eight hundred dollars, he is to have one-sixth part, less the amount of eight hundred dollars, and as to the remaining one-sixth part of all I may die possessed of, I do order to be given in trust to Orlando Wood for the use of Mortimer Wood, to be paid to the said Mortimer Wood as his necessities may seem to require."

Since the death of the testatrix the executor named in the will and all of the children and legatees of the testatrix entered into a written agreement with the defendants, by the terms of which they agreed to convey to the defendants certain real estate of which the testatrix died seized, and the defendants bound themselves to purchase. The defendants having refused to comply with the agreement upon the ground that the will did not confer upon the executor any power of sale, the bill in this cause was filed to compel the specific performance of the contract of sale by the defendants. The only question raised which it is necessary to determine is that the executor is not vested, either expressly or by implication, with a power of sale, and therefore a marketable title is not offered.

The testatrix in and by her will appoints an executor to manage and settle her estate, and then blending her real and personal possessions gives to four of her children each a one-sixth part of the whole, to another one-sixth, less \$800 charged as an advancement, and the remaining one-sixth to Orlando Wood, the executor, in trust for the use of another son. It thus appears that the testatrix intended an equal division of her entire estate, real and personal. What one-sixth would amount to, after the payment of debts, can only be ascertained after the executor has fulfilled the duties of his office and settled his final account, to determine which there must be a sale of all the real and personal estate, for the testatrix has, by her will, blended the two kinds of property into a common fund. It is a part of the duty of the executor to make the division required by the will and to hold at least one share in trust. "If the executor is directed by the will or bound by law to see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty—which it is the duty of the executor to dispose of and pay over—then a power of sale is con-

2 Buch. Jonas Glass Co. v. Glass Bottle Blowers' Association.

ferred on the executor by implication." *Lippincott's Executor v. Lippincott*, 19 N. J. Eq. (4 C. E. Gr.) 121. The proceeds of this estate will, under this will, have to pass through the hands of the executor in the form of money. To make the division and establish the trust requires a sale of the land, and although a power of sale is not expressly given it arises under the circumstances existing in this case by implication.

The result, therefore, is that the objection made by the defendants is not well founded, and there being no other reason offered why this contract should not be specifically performed, it will be so decreed.

THE GEORGE JONAS GLASS COMPANY

v.

THE GLASS BOTTLE BLOWERS' ASSOCIATION OF UNITED STATES
AND CANADA, WILLIAM M. DOUGHTY et al.

[Submitted May 8th, 1907. Decided May 18th, 1907.]

1. An organized attempt to induce the public to refrain from purchasing the products of a manufacturer, and to deprive him of a part of his trade market, commonly called "boycotting," having for its object the compelling of the manufacturer to unionize his business and the submission of its conduct to the regulations of a labor union, is an irreparable injury to his property, the continuance of which a court of equity will enjoin.

2. A combination or agreement to picket a manufacturing plant for the purpose of interfering with the free flow of labor to an employer, to whom labor is a necessity for the carrying on of his business, which, if successful, will prevent him from obtaining the means of pursuing a lawful occupation, and the sole purpose of which is to compel him to comply with the demands of an antagonistic power, is a conspiracy against the property rights of the employer, subjecting his property to an irreparable injury, and all parties to such compact, actors as well as abettors, will be restrained from establishing and maintaining such picket service.

3. A labor organization seeking to compel a manufacturer to unionize his plant is not such a competitor in the labor market as to justify it in

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enticing employes to leave the service of their master, or to induce persons seeking employment with him from so doing, when the enticer does not employ labor. The competition which the law upholds must be honest competition, and not a malicious attempt to injure another.

On bill for injunction. Final hearing on pleadings and proofs.

Messrs. Hampton & Fithian and Mr. John W. Harding, for the complainant.

Mr. Louis H. Miller and Mr. John W. Wescott, for the defendants.

BERGEN, V. C.

This controversy arises over an attempt of the principal defendant, the Glass Bottle Blowers' Association of the United States and Canada, and its officers, who are also defendants, to compel the complainant to "unionize its factory." The association is not incorporated, but a voluntary society made up of a number of persons who act as its officers, and control, through the medium of what is described as "local unions," a certain class of workers in glass-blowing factories who are willing to join the organization. The executive officers annually confer with the representatives of such factories as consent to be unionized, and together they fix the rate of wages to be paid and the general conduct of the manufacturers' business for the coming season, and the result of this conference is communicated to the local unions, who are supposed to comply therewith. It appears in this case that the association had, in 1901, succeeded in unionizing and bringing under its control the management of all factories in New Jersey doing a business similar to that of complainant, save that of the complainant and one other which is managed by the persons interested in complainant's business.

The complainant's factory since 1896 had been a subject of annoyance and dissatisfaction to the association, because Mr. Jonas, its president and principal owner, had persistently refused to subject his business to the management and control of this self-constituted monitor, and after an attempt to boycott

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the business of the complainant had failed to drive it into the union, a strike was declared at the works of the complainant located at Minotola, in the county of Atlantic in this state, on the 9th day of April, 1902, whereupon the employes of the complainant to the number of, approximately, three hundred, left the employment of the complainant, leased a lot of land in the immediate neighborhood of the factory and procured and set up a large tent in which the strikers congregated, which was afterwards replaced, at the expense of the defendant association, by a substantial wooden structure used for the same purpose. While the officers of the association deny that they instigated the strike, they all admit that immediately upon its declaration some of them took the management and direction of the men who were engaged in it. The complainant charges that, by violence, threats and opprobrious epithets, the officers of the association, and the men whose actions they were directing, intimidated persons seeking employment at its factory, and prevented them from doing so; that the strike was the culminating effort of the officers of this association to drive it to the wall, and compel it to submit to their dictation, and further that, although restrained by an order of this court, made in this cause, when the bill of complaint was filed, they have desisted from acts of physical violence, a cordon of pickets guard all the highways leading to the complainant's factory, by whom all persons seeking employment there were, at the time the evidence in this cause was taken, subjected to ridicule, opprobrious epithets, and open or implied threats; that such picketing is a violation of its constitutional right to conduct its business in a legal way according to its own methods, resulting in injury to its business and the destruction of its property.

Before entering upon the consideration of the case, I take occasion to say that it is not intended, by anything that may appear in this opinion, to question the right of proper organization for lawful purposes, nor the right of anyone to peaceably state his side of a controversy, provided it be what it pretends to be, and is done without threats or show of force, or in any manner or under any conditions, which may fairly indicate that a threat is intended either to person or property, yet it is not

necessary that the deterrent force be threatening words; acts are sometimes more effective than words, but words or acts which, taken in connection with the surrounding circumstances, are intended to intimidate, and which naturally would deter an ordinary person from proceeding to obtain work from one entitled to employ him, are not peaceable persuasions, for they interfere with "the right of personal security, the right of personal liberty and the right of private property," the enjoyment and pursuit of which is guaranteed to every citizen by the constitution of the state, and the law of the land.

In 1892 George Jonas established at Minotola a factory for the manufacture of glass bottles, and conducted the business as an individual until 1897, when the complaining company was incorporated under the laws of this state, and the property transferred to it. When the plant was located no village existed, but a considerable tract of land was purchased, and the necessary manufacturing buildings put up, as well as a number of dwelling-houses, which were rented to the employes of the company, so that in April, 1902, the company had invested about \$300,000 in land, machinery, merchandise and buildings, forty-seven of the latter being tenant-houses. In the year 1896 one George W. Brannin, a member of the executive committee of the defendant association, called upon Mr. Jonas, at Minotola, and had a conversation with him about unionizing the factory, without any agreement being reached. In 1899 Brannin again visited Jonas, and told him that they expected to unionize the different glass factories in South Jersey, and "they had gotten our men, some of them, to go out with them, and he thought it would be to our best interest to unionize the plant." Brannin made no threats, and his conduct during both interviews appears to have been confined to an attempt to demonstrate to Mr. Jonas that it would be of advantage to the complainant to run its factory under the rules and regulations of the association, one of these rules being that complainant should only employ one apprentice to fifteen journeymen, while nearly all of the men then employed by it were apprentices. Shortly after this, according to the testimony of Mr. Jonas, about twenty of the men employed by the complainant left, and took employment elsewhere, one of them

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exhibiting to Mr. Jonas a card, signed by Mr. Hayes, the president of the association. This card, as I gather from the evidence, being a certificate of the association, that the party holding it was a member of the union, and entitled to work in any union shop. The first move made by the association to coerce the complainant into a compliance with its wishes was an attempt to induce the firm of Whittimore Brothers Company, of Boston, Massachusetts, to withdraw its patronage from the complainant. This firm, who were manufacturers of shoe polish and blacking, had entered into a contract with the complainant for the manufacture of bottles for use in their business, amounting to about \$35,000, and in October, 1901, the association issued and circulated generally in the United States and Canada a circular letter signed by Dennis A. Hayes, its president, addressed "To our Brethren in the labor movement, Greeting," portions of which read as follows:

"The Glass Bottle Blowers' Association of the United States and Canada request your attention to the following statement:

"For fifteen years we have been fighting non-unionism and company stores in New Jersey. * * * There are two non-union concerns remaining. The principal one is operated by the George Jonas Glass Company. * * * The factories at Minotola are operated almost exclusively on bottles for the Whittimore Brothers Company, Boston, Mass., manufacturers of shoe and leather dressing, and if we could secure the withdrawal of this order we might make terms with the George Jonas Glass Company. We have appealed several times to the Whittimore people, and later Mr. James Duncan, first vice-president of the American Federation of Labor, called on them a number of times in relation to the matter, but his efforts and ours were alike unavailing. The firm ignores our appeal. Thus it has been placed on the unfair list of the A. F. of L., and we hope you will bear this in mind when about to have your shoes blacked, or whenever buying shoe polish or leather dressing of any kind. We would feel under many obligations if you would appoint committees to wait on business men who handle this line of goods, and also write to the Whittimore Brothers Company, No. 237 Albany street, Boston, Mass., asking them to withdraw their patronage from the concern at Minotola. * * * We want this firm to realize that organized labor is a power, and that its efforts to assist and protect the helpless and oppressed cannot be lightly turned aside."

The response to this circular was prompt and effective, for letters were mailed from all parts of the country to the Whittimore Brothers Company, of which over one hundred and fifty

have been put in evidence, the result being that Whittimore Brothers Company refused to observe their contract with the complainant, which was thus deprived of a market for its goods of great value. One of these letters, written January 3d, 1902, from Canton, Ohio, which reflects the average expression of all, reads in part as follows:

"P. S.—We have a strong union city, and they claim that you buy your bottles from the George Jonas Glass Company, of Minotola, N. J. If such is the case, I must ask that you cancel my spring order, but as you know as well as I (or better), will you please write me a letter to hand over to committee of—labor, &c., &c., see—do not give me away. Say what there is in it. I cannot use your goods while the 'ban' is on. I will not try. Send letter if you wish, to be read in council. I will not use goods unless the ban is raised."

It also appears that after the bill of complaint was filed in this cause the defendant association continued its boycott against the complainant by sending letters to its customers, notifying them that it was known they were having their bottles made at Minotola, and after stating that revelations of the most appalling character had been made regarding the working of children, and that "two mere babies, worked in open defiance of the law by the George Jonas Company, were killed in the most sickening manner," continued "that they had decided to put three men on the road, also to establish a press bureau for the purpose of giving to the public the information necessary to enable them to withhold their patronage," from parties using the product of the complainant. In order to indicate the character of the boycott inaugurated and carried on by the defendant association, the following letter is pertinent:

"Menard Liniment Company, Boston, Mass.:

"GENTLEMEN—In re abuse of children by Jonas et al., some time since we wrote you calling attention to your responsibility for wrongs therein complained of. Are we to understand from your silence that you wish us to publish to the world that you endorse and stand for the slaughter of the innocents? Very truly, E. A. AGARD."

The evidence in this cause abundantly proves that the defendant association attempted to establish a boycott against the goods manufactured by the complainant, and so far succeeded as to

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cause it a serious loss of property, for the sole purpose of compelling the complainant to unionize its factory, or in other words to submit the conduct of its business to the demands of the association. Such conduct has been declared by this court to be unlawful, a conclusion which meets my hearty approval. *Martin v. McFall*, 65 N. J. Eq. (20 Dick.) 91.

The next important step taken by the association to accomplish its purpose was the sending of a letter to the complainant signed by Dennis A. Hayes, the president of the association, bearing date March 27th, 1902, in which he states that he has been requested by the workmen of complainant "to seek a conference with you, to so far as possible, correct those grievances and unionize your factory." In ascertaining the real purpose of this letter it must be borne in mind that Hayes testifies that at this time none of the employes of the complainant were members of his association; that he then had no special interest in them, because many of them had taken the places of those who had participated in the strike, and left the complainant in 1899. The only request made in this letter on behalf of the workmen is that they should be conceded such wages and privileges as unionized factories were paying and allowing under an agreement with the association, therefore it is quite apparent that this letter was only another step looking to the compelling of the complainant to submit to the association, for the wages and privileges, the absence of which is described as a grievance, were mere incidents of the control by the association of complainant's business, for once unionized, the other results would follow, and the conclusion is justified that under a pretence of benefiting labor these officers were seeking power and attempting to establish a monopoly that would stifle competition between workmen desiring to labor in that line, for it is not denied that the number of apprentices under union rules is restricted for the purpose of keeping to the minimum the supply of skilled labor.

The complainant refused to unionize its factory, and on April 9th, 1902, about two weeks after this letter was written, over three hundred of complainant's workmen left its employ, and a strike was declared, which has been since maintained under the direction and management of some of the principal officers of

the association, with the avowed object of compelling complainant to unionize.

The present proceeding was instituted by the complainant to have the defendants, among whom are numerous of its former workmen, enjoined from boycotting its business; inducing its employes by threats, intimidation, force, violence or the payment of money to refuse to perform their duties or leave its service, or by like methods preventing those who desire to do so from entering its employment, and also from using indecent and opprobrious epithets to its officers and employes; from collecting singly or in combination with others with the intention of picketing the public highways leading to its factory, for the purpose of inducing laborers not to take employment with it; from gathering at railroad stations at or near complainant's works and inducing, or attempting to induce, persons arriving at such stations seeking employment at complainant's factory from so doing, and generally from bribing or intimidating workmen to refrain from entering complainant's employment, or inducing those who are employed to leave.

The principal officers of the defendant association have been called, and they all deny that they instigated the strike; but such denials have little weight when considered in connection with their previous and subsequent conduct, for it is quite clear from the evidence that months before the strike occurred they had been engaged in an effort to bend complainant to the will of their association, and employed all the resources of a rich, powerful and well-organized society to deprive the complainant of a market for its goods, and to accomplish the destruction of its business in default of its submission to their will, when, failing in such efforts this strike was declared, a strike which the officers of this association are immediately found to be directing and controlling, and in furtherance of which the association for a long period, if not to the present time, has paid the wages not only of the men who left the factory, but of strangers brought from other places to lead and direct the strikers. The first demonstration after the strike was declared was a parade led by the defendant Doughty, the vice-president of the association, preceded by a band of music, and Mr. Hayes, the president of the association,

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was so promptly on the ground that the suspicion is justified that he had knowledge of what was coming. The testimony of the witness Edward C. Rush shows that some time prior to this strike meetings of the workmen were held at Vineland, which he attended, and that the defendants Doughty and Launer, another officer of the association, were present at different times and addressed the meetings, advising the men to organize and keep still about it, and that "they would take care of them and pay them good wages if they went out." I am satisfied from the evidence that this strike was promoted by the officers of this association, in pursuance of their conceived scheme to compel the complainant to unionize its factory. I believe that Mr. Hayes told the truth when he testified that he had no interest in the workmen before the strike, because they had taken the places of other strikers, and am satisfied that he used these men as a means to accomplish his long-cherished purpose; that it was a war of conquest, not for the relief of the downtrodden as he now seeks to convince us, and that the officers of this association are as directly responsible for the acts of violence and unlawful conduct of these men as if they had actually participated in each of them. I give little credit to, and have no respect for, men who inaugurate a movement which they know they cannot control, and then seek to excuse themselves because they have advised, as they say, a body of men, many of them ignorant Italians, against the doing of unlawful acts, when common sense and ordinary experience teaches that a body of idle workmen, called together at a common rendezvous, such as this association provided, pay no attention to moral precepts communicated for the purpose of being used as a defence when called upon to respond for the acts of a disorderly mob. If these men had been advised to return to their homes and act as orderly, law-abiding citizens, simply exercising their right to quit work, a different situation would have been presented, but, on the contrary, they were gathered at a place provided by the officers of the defendant association, for no possible reason except to make a show of force, the known effect of which would be to arouse the fears of others desiring to remain at work, or to take the places of those who had left, and whose continued employment would endanger the success of the

result sought to be accomplished. The parties who start a conflagration are, and should be, responsible for its consequences.

The testimony in this case is too voluminous to permit of a particular analysis; it is enough to say that I find that acts of violence were committed; that terror reigned in this village for several days; that peaceable citizens seeking to obtain work were met on the public highways by large bodies of these strikers and turned back; that persons seeking to move into the town were stopped on the public highway and only permitted to proceed through the interference of a peace officer; that private dwellings were visited by bands of men for the purpose of deterring persons desiring to continue work from doing so; that one of the employes who returned to work was assassinated, all attempts to discover the perpetrator being futile, because of the conditions existing, and all of this done, it is claimed, in the interest of organized labor, a claim which, in my judgment, no class of men will be more swift to repudiate than the fair-minded members of the labor organizations of the country.

A part of the argument submitted by counsel relates to the question whether the laborers were justified in striking. With that question I conceive the court has nothing to do. Men have a right to cease work whenever they choose, with or without a reason. If they violate a contract the master has his legal remedy in damages, and so long as workmen abandoning work disperse and behave as quiet orderly citizens they are only exercising their rights, but when by force or intimidation they undertake to deter those who are willing to work from so doing they violate the law of the land. On the argument counsel for the defendants admitted that violence, intimidation and all unlawful interference with persons seeking employment with the complainant was an illegal infringement of its property rights, and rested their defence on this branch of the case upon a denial that the conditions which I have found to exist did exist, and I have no hesitation in declaring that such conduct should be restrained.

There is still another branch of this case to be considered, and that is the placing of men, two or three in number, on the highways leading into Minotola, for the alleged purpose of peaceably

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persuading laborers from seeking employment with the complainant. After very carefully considering this question I am of opinion that the complainant is entitled to have the defendants restrained from establishing or continuing such picketing, for the only purpose to be served is to intercept persons coming to seek employment with the complainant, and a court should judge of the right to maintain that sort of surveillance over a complainant's business, according to its evident intent and purpose. In its mildest form it is a nuisance, and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted antagonistic committee, whose very presence upon the highway for such purpose is deterrent, is just as destructive of his property as is a boycott which prevents the sale of his product. As was well said by Judge McPherson, speaking for the United States circuit court: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." *Atchison, Topeka and Santa Fe Railway Co. v. Gee*, 139 Fed. Rep. 582, 584.

The single object sought to be obtained by picketing is to prevent the complainant from continuing its business by depriving it of one of its essential necessities, namely, labor, for if the picketing has not that object the reason for maintaining pickets would not exist. That a person who has left his employer may approach another and, if he is willing to listen, tell him the truth regarding the conditions existing, does not meet the question being considered, because in this case there is a well-defined scheme in which a number of persons have joined to prevent the complainant from carrying on his business. It is not a case where the individual on his own behalf is taking his grievance to a willing listener, but a combination of men, backed by great wealth, conspiring to deprive the complainant of the means of carrying on its business, with the hope that it will ultimately be compelled to yield and surrender its property to the control of strangers, and any picketing which deprives a citizen of his property rights, which it is manifest the acts complained of in this case are intended to accomplish, is subversive of all law and order, and if permitted to continue will in the end destroy the

prosperity and happiness of society. The defendants frankly admit that the purpose of picketing is to induce every person intending to seek employment with the complainant to refrain from doing so, and attempt to justify it upon the ground that they are competitors of the complainant in the labor market, and being such, have the right to take from it all laborers that they can persuade to leave it or refrain from entering its employ.

Honest competition is what every business man must submit to, but it must be competition and not a malicious intention to injure. Inducing the employes of a person to leave their employment, or others not to accept his employment, for the purpose of crippling his business, where the organization offering the inducement is not engaged in any business competitive or otherwise, and which has no need of the labor, and no reason for interfering beyond the avowed purpose of overthrowing the complainant, in the stand which it has taken against the demand of the organization, that it shall unionize its factory, is not the competition which the law recognizes or upholds, for "the result which they seek to obtain cannot come directly from anything they do within the regular line of their business as workers competing in the labor market. It can only come from action outside of the province of workmen intended directly to injure another." *Berry v. Donovan*, 188 Mass. 353.

It was urged on the argument that the proofs did not show that every defendant was guilty of some act of violence. It, however, appears that all of the defendants were a part of the combination to compel the complainant to unionize its factory. They did not leave their work and go to their homes, but congregated in large crowds, some participating in one act of violence, some in another, and it is impossible, in any ordinary way, to positively identify each member making up a mob of two or three hundred men. They were all at the headquarters provided by the association for the strikers, were all paid out of the funds of the association, and the strikers were under a written contract with the complainant to serve for a definite period, and all joined together in a body to disregard their written obligations. These acts show that a conspiracy was entered into by all of the defendants to compel the complainant to conduct its business under

2 Buch.**Schmitt v. Traphagen.**

rules and regulations, to which it was unwilling to submit, and the overt acts of some of the defendants in carrying out the object of the combination, having caused irreparable injury to complainant's property, all those who aided and abetted are equally responsible, and all should be enjoined, for the injunction can work no hardship, as it affects no right of property or restrains the doing of any lawful act.

The complainant is entitled to an injunction against the defendant association and its officers, particularly the defendants Hayes and Agard, restraining it and them from persuading or inducing persons or corporations not to deal with it because it employs non-union workmen, or refuses to be unionized, and against all of the defendants according to the prayer of the bill, except so much thereof as relates to the paying of money to the employes of the complainant, who have left or may voluntarily leave its service.

JOSEPH SCHMITT

v.

HENRY TRAPHAGEN.

[Decided November 27th, 1906.]

In a suit to quiet title, a motion for a new trial of an issue directed to be tried at law will be denied by the court of chancery without examining into the merits of the decision, since an appeal can be taken as well from the judgment directed by the justice of the supreme court, as from any judgment upon the same question emanating from this court.

Messrs. Russ & Heppenheimer and *Mr. Maximilian T. Rosenberg*, for the complainant.

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Messrs. Collins & Corbin and Mr. Augustus A. Rich, for the defendant.

GARRISON, V. C.

This is a suit under the act to quiet title, and is a motion in such suit for a new trial of an issue directed by this court to be tried at law in accordance with the provisions of the statute.

It appears from the state of the case submitted to this court that at the trial in the supreme court the justice of the supreme court presiding thereat conceived that the sole question was one of law, and therefore directed a verdict in favor of Schmitt upon the issues tried before him.

I have not myself examined the question which was passed upon at the trial in the supreme court, and for the reason which I am about to state: The question, if it was one of legal title, was eminently one to be passed upon by the courts of law. It was conceived to be such a question by the eminent jurist presiding. Any independent investigation that I could make would result either in concurring in his judgment or in disagreeing with it, and in the latter event, if I granted a new trial, the justice of the court sitting at such new trial would probably consider that he was bound by the same view of the law taken by the justice of the supreme court sitting at the first trial. It appears to me that the best solution of this question is to have an appeal taken as promptly as possible to the court of ultimate decision, and this can be as well done from the judgment directed by the justice of the supreme court as from any judgment upon the same question emanating from this court.

I have therefore determined to adopt the view of the law enunciated by Mr. Justice Dixon, at the trial, as my view, and to refuse a new trial.

2 Buch.Brown v. Brown.

CHARLES S. BROWN et al., executors, &c.,

v.

CHARLES S. BROWN, individually, et al.

[Decided January 23d, 1907.]

1. The court will not, in advance, advise executors authorized to compromise debts due to the testator how they shall exercise the power, but they must, at their peril, exercise their own judgment with respect thereto.

2. Where a testator declared that no advancements should be charged against his children unless advances or charges should be made on his books against his children, a charge against a son, found on the books, must be treated as an advancement.

3. Where a testator set aside a certain sum for his wife for life, and provided that on her death two-tenths were to be paid to a son, and directed that two-tenths of the residue of his estate should be held in trust for the son for life, and, on his death, to his issue surviving, and the son was indebted to the testator, the son's indebtedness must be charged against the bequests made to him.

4. A testator provided that advances made to his children should not be considered unless the advances should be made on his books. On the books of the testator appeared a charge against a son, followed by the statement that same should not bear interest.—*Held*, that the indebtedness due to the estate from the son did not draw interest.

5. A testator directed that of the residue of his estate one-tenth should go to his daughter, and that the executors, on the written request of the daughter, should set apart to her the residence of the testator, on request therefor prior to the sale thereof, at a specified sum. The executors made a partial distribution of the estate, and set aside personalty to the daughter. Subsequently she requested the executors to set aside for her the premises mentioned.—*Held*, that if the daughter returned to the estate the personalty set aside to her, and the executors gave her the premises, no one could complain.

6. A testator gave the residue of his estate to his executors to take possession thereof, collect the rents, pay taxes, assessments and liens, and directed that the executors should set apart a specified sum for a trust fund, divide the residue into equal shares, some of which were given absolutely and others in trust. The testator left real estate unimproved, against which municipal assessments had been levied. The executors had not divided the residuary estate.—*Held*, that as to the assessment for municipal improvements there must be an equitable apportionment

between the tenants for life and the remaindermen, by the payment of the whole sum out of the principal, and providing that each year interest should be calculated on the amount paid, and deducted from the income.

7. Where a testator leaving real estate died June 30th, and the estate was subject to assessment for taxes as of May 20th in the name of the owner thereof at that date, the executors were required to pay the taxes out of the estate and charge the same against the principal.

8. A testator owned stock in a corporation, which, after his death, increased the authorized stock, and gave to the shareholders the right to subscribe to the increased issue. This right the executors sold for a substantial sum.—*Held*, that the sum thus received became principal, and did not go to the life tenants of the stock.

9. A testator owned a specified number of shares in a trust company, and after his death the stock of the company was increased and allotted to the shareholders. At the same time the company declared a dividend, and provided that the right to subscribe to the new stock and the right to receive the dividend should accrue simultaneously. The executors paid for the stock with the dividends.—*Held*, that the stock so purchased must be held to be a dividend as between life tenants and remaindermen.

10. Where a testator bequeathed stocks and bonds, which passed into the possession of the executors and trustees of his will, the executors and trustees, if continuing to hold the same in the exercise of good faith, will be protected from any losses by virtue of *P. L. p. 236*, providing that, when bonds and stocks come into the hands of executors or trustees under the will of a testator owning them, they shall not be accountable for any loss by reason of continuing to hold them, provided they exercise good faith and reasonable discretion.

11. Where a testator vested his executors and trustees with power to invest in improved and productive real estate, or in sound, productive securities, as they might deem best, the executors were not exonerated on investing money in stocks which depreciated and thereby caused a loss to the estate, as the authority conferred did not merely bind them to the exercise of good faith and reasonable judgment.

12. Where executors empowered to sell real estate of the testator employ real estate agents to procure purchasers of real estate, the commissions paid to such agents are payable out of the principal of the estate, and not out of the income.

Heard on bill, answer, replication and proofs in open court.

The complainants are executors and trustees under the will of Lewis B. Brown, deceased. The defendants are the persons interested in the estate of the testator.

The bill is filed to obtain a construction of the will in various respects, and to procure directions to the trustees concerning various matters respecting their trust.

2 Buch.Brown v. Brown.

The will was dated November 22d, 1898. Lewis B. Brown died on the 28th of June, 1900. The various questions will be dealt with under separate heads.

Mr. Edmund W. Wakelee, and Mr. Wendell J. Wright and Mr. Edward V. Thornall (of the New York bar), for the complainants.

Messrs. Mabie & Maidment, for the defendants.

GARRISON, V. C.

I.

Lewis M. Brown was the son of the decedent and owed money to his father. He is also a beneficiary under the will. It is necessary to construe the will and refer to the facts so as to arrive at the proper determination of the duty of the complainants in the premises.

The fifth paragraph of the will is as follows:

"To divide the rest, residue and remainder of my estate into ten equal parts or shares, and [to pay over certain of such parts or shares to named persons, &c.] to set apart two such equal parts or shares of my residuary estate, hold the same in trust, invest the same, and to receive the rents, issues and profits thereof, and to pay the net profits and income thereof to my son, Lewis M. Brown, during his natural life, and on his death, or if he should die before me, I direct the executors and trustees of this my will to transfer and pay over the whole of such two equal parts or shares of my residuary estate, with any unexpended income thereof, to the lawful issue of my said son, Lewis M. Brown, surviving him, *per stirpes*, and not *per capita*, as their own forever."

The fifteenth clause of the will is as follows:

"I hereby direct and declare it to be my will that no advances which have been made by me to any of my children * * * during my lifetime shall be charged against them, or either of them, or in any manner be considered as a part of the provisions hereinbefore made for them, or either of them, but that each of my said children * * * shall receive and enjoy the provisions hereinbefore made for them in all respects, as if such advances had not been made; provided, nevertheless, that if any security or written acknowledgment for any advances to, or payments in behalf of, any of said children * * * shall be held by me uncanceled at the time of my decease, or if any advances or charges shall be made

upon my books of account against said child, * * * the above provision shall not apply to the extent of such advances or charges, but such advances or charges shall be charged against, and be deducted from, the share of such child or grandchild in my estate."

Upon the books of the testator there was found a charge against his son, Lewis M. Brown, amounting to \$35,616.08.

Lewis M. Brown is insolvent and nothing can be collected from him.

The fourteenth paragraph of the will is as follows:

"I authorize and empower my said executors, or such of them as shall qualify, and the survivors and survivor of them, to compromise, compound and discharge any debt or debts due to me at the time of my decease upon such terms as they shall deem best, and I hereby expressly direct and declare that my said executors shall not be held personally liable in any manner for any debt or debts so compromised or discharged."

The complainants desire to be instructed as to their duties in respect to this matter.

First, they ask whether, under the fourteenth paragraph of the will, they are empowered to discharge the debt due by Lewis M. Brown to the estate.

While executors have the power to compromise, compound or release claims against the estate at common law, and in many jurisdictions by statute, and while the power may be conferred as in this case, by will, I am of opinion that the court should not, in advance, advise them how they should exercise their discretion, and would, when it had been exercised, approve or disapprove of their conduct, after considering all the facts, making the test whether their action was for the best interest of the estate or not.

The general principles and the authorities will be found collected in *11 Am. & Eng. Encycl. L. (2d ed.) 926-929*, inclusive.

The court, in the matter of giving instructions or directions to trustees under a will, exercises its discretion as to whether it will advise or direct upon the matters submitted to it, and I do not think it would be discreet for the court to advise these complainants to make a compromise or to release Lewis M. Brown from whatever obligation he is under to the estate. I think the com-

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plainants, at their own peril, must use their own judgment with respect to the power to compromise, compound and release. In the event of their not exercising their power, and of their refusing to compromise, compound or release the obligations of Lewis M. Brown to the estate, it becomes necessary to deal with the other provisions of the will above quoted.

I am of opinion that, by reason of the charge found on the books of the testator against Lewis M. Brown, that sum must be dealt with in accordance with the provisions of the fifteenth clause of the will above quoted. That clause provides that any such advance or charge "shall be charged against and deducted from the share of the child so charged." It becomes, therefore, necessary to determine what share Lewis M. Brown has in the estate of Lewis B. Brown, deceased. Under the fourth clause of the will \$60,000 was set aside for the wife of the testator, of which she was to have the income for life, and upon her death the principal was to be divided into ten equal parts or shares, of which two were to be paid to Lewis M. Brown. The wife of Lewis B. Brown is dead, and Lewis M. Brown therefore is entitled to \$12,000 under this provision.

I am of opinion that the amount charged on the books of the testator against Lewis M. Brown must be charged against or deducted from this sum. Since the charge is larger than this sum by \$24,000, it is necessary to determine what other share Lewis M. Brown has in this estate. Such other share arises under subdivision C of paragraph 5 of the will, which has been quoted above. Thereunder Lewis M. Brown has the income for life of two-tenths parts or shares of the residuary estate. The income upon such parts or shares is given to him for life, vesting in his lawful issue.

I am of the opinion, therefore, that against such share the remainder of the amount of the advancement to Lewis M. Brown must be charged. I reach this conclusion because I cannot find any other part or share of the estate that is left to Lewis M. Brown. Under the clause just mentioned he was not left the two-tenths of the residuary estate. These two-tenths were left to his lawful issue. That which was left to him was the income

thereof, and that, in my view, constitutes his share of the estate under that clause.

I am of opinion that the amount appearing on the books as charged against Lewis M. Brown does not bear interest, because in said books the testator had written that the charges therein contained against his children were not to bear interest. Whether or not interest is collectible is a matter of agreement or intention, and the intention clearly appears here that no interest is to be charged.

II.

Another matter upon which instructions are asked arises under the eleventh paragraph of the will, which reads as follows:

"Whereas, I now own the house and lot now known by the number seventy-three West Fifty-fifth street, in the city of New York, borough of Manhattan; and whereas, the same is now occupied by my daughter, Helen B. Coles, the executors and trustees of this my will, the survivors and survivor of them, shall, upon the written request of my daughter, Helen B. Coles, acknowledged in the same manner as deeds are required to be acknowledged, set aside and include in the one-third share of the two-tenths part of my residuary estate hereinbefore directed to be held in trust during the lifetime of my said daughter, Helen B. Coles, and as a part of said share, the said house, number seventy-three West Fifty-fifth street, provided such request is made prior to a sale of such house and lot by my said executors and trustees, such house and lot to be taken and valued at twenty-five thousand dollars."

The complainants, acting under the authority of the will, on the 10th of August, 1900, made a partial distribution of the estate, and set aside as part of the share above mentioned of Helen B. Cole's forty shares of stock in the Consolidated Gas Company of New York at the inventoried value of \$6,960, and thereafter received, as trustees, the dividends thereon, amounting in all to \$720. On December 31st, 1902, the house not having been sold, Helen B. Coles, complying in every particular with the paragraph of the will just quoted, requested the complainants to set aside and include in the share to be held for her the house and lot above mentioned. It being uncertain whether or not the share to be set aside would exceed the \$25,000 at which

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the house was to be valued, the complainants refused to comply with the request unless Helen B. Coles should return the dividends received by her on the gas stock, and should authorize the complainants to return to the general estate the gas stock which had been set apart as part of her share and should also pay whatever had been expended by the complainants upon the real estate by way of taxes, water rents, &c. They set out that the authorization to them to return the gas stock to the general estate, or rather to take it out of the share set aside for Mrs. Coles, was given by everybody then *in esse*, and that since that time a child has been born to one of the beneficiaries, and there is a possibility of other children being born who will have interests, and they therefore seek a ratification of their action.

I cannot see how the court can do any more than say that if the share to be set aside for Mrs. Coles exceeded \$25,000 the executors have no choice but to comply with her request, and if, previous to her making such request, something else had been set aside for her share, and she returns to the estate all that she received upon that something else so set aside, no one can be heard to complain.

III.

Instructions are sought with respect to the payment of taxes upon real estate of which the decedent died seized, assessments for municipal improvements levied against said premises since the decease of the testator, and fencing required to be placed around certain of the property by the board of health of the city of New York.

The will, after making certain bequests, in the tenth clause provides as follows:

"I give, devise and bequeath all the rest, residue and remainder of my estate, both real, personal and mixed, and wheresoever situated, of which I shall die seized or possessed, or to which I may be entitled in any manner at the time of my decease, to my executors and trustees * * * for the following purposes:

"1. To enter into and take possession of my said estate, real, personal and mixed, and to collect and receive the rents, income, issues and profits thereof, and to pay and discharge all mortgages, taxes, assessments, and

all other liens and encumbrances upon the same whensoever the same become due.

"2. To sell, at public or private sale, at such times and in such parcels, and for such price and upon such terms of cash or credit as they shall deem for the best interest of my estate, such of my real estate and such of my personal property as they shall deem proper to dispose of, and for that purpose, and for the purposes of carrying out the provisions of this will, I hereby give said executors and trustees * * * full power of sale and disposal of the same."

Power of investment and reinvestment is then given. The trustees are then required to set apart \$60,000 for a certain trust fund, and by the fifth subdivision of this paragraph are required "to divide the rest, residue and remainder of my estate into ten equal parts or shares." Some of these tenths are given absolutely and others are to be held in trust.

The executors have not made an actual division of the residuary estate into tenths, having only set apart certain stocks, and have otherwise held the residuary estate as a whole.

The decedent left a large estate, and part of the same consisted of vacant lots of land in the city of New York, unimproved in any way and unproductive of income. Municipal assessments for improvements of various kinds have been levied upon this property since the death of the testator. Taxes have also fallen due upon the said property. The board of health of New York required certain of the lots to be fenced in. The executors have paid all of the above imposts, and now seek directions as to how to charge the same in their accounts.

Since the residuary estate is not divided and is held by the trustees awaiting favorable opportunity to convert it in divisible property, it must be dealt with as a whole. *Holcombe v. Holcombe*, 29 N. J. Eq. (2 Stew.) 597 (*Court of Errors and Appeals*, 1878); *Outcalt v. Appleby*, 36 N. J. Eq. (9 Stew.) 73 (at p. 87) (*Chancellor Runyon*, 1882); *Brearley v. Molton*, 62 N. J. Eq. (17 Dick.) 345 (at p. 351) (*Chancellor Magie*, 1901), and the ordinary taxes and expenses of upkeep are to be paid out of the income derived from the estate. *Howard v. Francis*, 30 N. J. Eq. (3 Stew.) 444 (*Chancellor Runyon*, 1879); *Murch v. Smith Manufacturing Co.*, 47 N. J. Eq. (2 Dick.) 193 (*Vice-Chancellor Green*, 1894); see cases *supra*.

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With respect to the assessments for municipal improvements there should be an equitable apportionment between the tenants for life and the remaindermen. *Holcombe v. Holcombe, supra*; *Outcalt v. Appleby, supra*; *Pratt v. Douglas, 38 N. J. Eq. (11 Stew.) 516 (at p. 542) (Court of Errors and Appeals, 1884)*.

The court of errors and appeals, in the case of *Jonas v. Hunt, 40 N. J. Eq. (13 Stew.) 660 (1885)*, held that the proper apportionment was interest on the amount invested by way of assessment, to be paid by the life tenant during his tenure. Therefore the whole sum should be paid out of principal, and each year interest should be calculated upon the amount paid, and the sum thus arrived at should be deducted from the income.

With respect to the fencing, I think a similar rule should be adopted; that being an impost required by the government, and presumably for the benefit of the estate, and not being of any present benefit to the life tenant any more than to the remainderman, I think the same rule should apply.

IV.

The next matter upon which instructions are sought concerns taxes for the period 1899-1900 assessed against the decedent upon lands owned by him at the time of the assessment.

There were such lands in the State of New York and also in the State of New Jersey. The decedent, as before stated, died on the 28th day of June, 1900.

In New Jersey the assessment is as of the 20th of May. *State v. Hardin, 34 N. J. Law (5 Vr.) 79 (at p. 80) (Supreme Court, 1869)*; *State v. Town of Union, 36 N. J. Law (7 Vr.) 309 (at p. 311) (Supreme Court, 1873)*; *State v. Shute, 43 N. J. Law (14 Vr.) 414 (at p. 416) (Supreme Court, 1881)*.

The land is required to be assessed in the name of the owner thereof on that date. *State v. Hardin, supra*.

If not assessed in the name of anyone, the assessment is invalid. *State v. Vanderbilt, 33 N. J. Law (4 Vr.) 38 (Supreme Court, 1868)*.

If assessed in the name of the person who subsequently became the owner after the period within which the assessment could be made, it is invalid as against this last-named person. *State v. Hardin, supra.*

The provision requiring the assessment to be made in the name of the owner has been by the supreme court stated to be in pursuance of the "intention of the law that the person or persons who owned the real estate on the day when by law the assessment is to commence shall be made personally responsible for the tax." *State v. Vanderbilt, supra.*

While it has been held that the tax on real estate is not, properly speaking, a debt, and cannot be enforced by action of debt, and can only be collected in the mode prescribed by statute (*Camden v. Allen, 26 N. J. Law (2 Dutch.) 398 (Supreme Court, 1857)*), it is, I think, clear from the citations above that the said tax must be held to be a liability of the owner to which he must respond in the manner prescribed by statute.

One such manner is by a distress upon his goods and chattels. *Gen. Stat. p. 3284 § 18; Present Stat., P. L. 1903 p. 422 § 43.*

I am of opinion, therefore, that the decedent was liable for the tax for the year 1899-1900 assessed against the real estate owned by him on the 20th of May, 1900, and that his executors must pay the same out of the estate, and it will, of course, therefore, be charged against principal and not income.

The court of appeals of New York has taken this view of the law, and also holds that in New York City taxes on real estate are assessed as of the second Monday of January in each year. *Matter of Babcock, 115 N. Y. 450.*

It is stated as a general principle that taxes on real estate which accrue during the lifetime of the owner are payable by the personal representatives. *11 Am. & Eng. Encycl. L. (2d ed.) 946; cases in note 3; 2 Supp. 840 note 3.*

Therefore the executors must also pay from the estate and charge to principal the taxes assessed upon the real estate owned by the decedent in the city of New York on the second Monday of January, 1900.

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V.

The next head upon which instruction is sought is with respect to various instances in which the testator had stock in corporations, which corporations, after his death, increased the authorized capital stock of the company and gave to the shareholders the right to subscribe to the increased issue, which rights were sold by the executors for substantial sums of money, and the question in each case is whether the money realized from the sale of these rights becomes principal or goes to the life tenants.

Under the cases of *Eisner's Appeal*, 175 Pa. St. 143 and *Matter of Kernochan*, 104 N. Y. 618, 630, it should go to principal.

VI.

The next matter concerning which instructions are sought is with respect to dividends upon shares of stock owned by the testator at the time of his decease. The proofs show various shares of stock held by the testator upon which dividends were declared and paid after the decease of the testator. The proofs also show the following facts with respect to the stock of one of such companies: The testator owned twenty-five shares of the capital stock of the Title Guaranty and Trust Company. On September 16th, 1902, the stock of this company was increased and the increase was allotted to the shareholders, each being given the right to subscribe to sixty per cent. of the number of shares held. At the same time the company declared a dividend of sixty per cent. and provided that the right to subscribe to the new stock and the right to receive the dividend should accrue simultaneously. The complainants took the stock and paid for it with the dividend. I think that this must be held to be a dividend and the new stock must be held as if it were a dividend.

The rule to be applied, as between life tenants and remaindermen, with respect to dividends, has been settled in this state by the case of *Lang v. Lang's Executors*, 57 N. J. Eq. (12 Dick.)

325 (*Court of Errors and Appeals, 1898*), followed in this court by *Lister v. Weeks, 60 N. J. Eq. (15 Dick.) 215* (*Vice-Chancellor Sterens, 1900*) (at p. 225): *affirmed, 61 N. J. Eq. (16 Dick.) 675*.

In the case first cited the court (at p. 327) says: "The underlying principle applicable * * * is that no corporate dividend declared after the right to the income has become severed from the ultimate ownership of the stock upon which such dividend is declared belongs in equity to the person entitled to income except so far as it is derived from the earning of the stock after such severance."

After alluding to the distinction which had been made in previous authorities between extraordinary dividends and ordinary or current dividends with respect to apportionment of those of the first class and not of the others, the court (at p. 328) says that it cannot "assent to the idea that some dividends should stand on a different footing from others," and points out that to hold that "where a life estate begins one day before a dividend is declared the entire dividend shall go to the life tenant may be convenient, but certainly is unjust."

At p. 329 the court applies the principle. That principle, as before stated, requires apportionment.

There must, however, be evidence before the court of the period for which the dividends were declared, the time of the previous dividend, the source from which it is derived, whether earnings currently made or surplus wholly earned before the decease of the stockholder, and other like matters. There will have to be a reference to a master to take this testimony and report thereon.

VII.

The next matter concerning which instructions are sought concerns investments.

These are of two characters—*first*, those stocks and bonds of corporations which were owned by the testator and passed into the possession of the executors and trustees. With respect to these the act of March 23d, 1899 (*P. L. 1899 p. 236*), applies,

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and protects the executors and trustees if they continue to hold the same in the exercise of good faith and reasonable discretion. *Coddington v. Stone*, 36 N. J. Eq. (9 Stew.) 362 (*Chancellor Runyon*, 1883); *Parker v. Glover*, 42 N. J. Eq. (15 Stew.) 559 (*Chancellor Runyon*, 1887).

The will in the case in hand vests the executors and trustees with power

"to invest all moneys left by me and the proceeds of the sales of my estate in improved and productive real estate, or in sound, productive securities, such as they may deem best, or in both real estate and securities. The authority to sell and reinvest shall apply to all investments made by them as my executors and trustees."

While I am personally inclined to the belief that it was the intention of the testator in this case to clothe his executors and trustees with discretion in the exercise of which they might invest the moneys in stocks or securities not authorized by law, and be only held to the exercise of good faith and reasonable judgment, I cannot, in view of the decisions of our courts, safely hold that the complainants in this case are thus protected. In the case of *Ward v. Kitchen*, 30 N. J. Eq. (3 Stew.) 31 (*Chancellor Runyon*, 1878), the court held that a provision that "my executor to invest in productive funds upon good securities" would be construed (p. 36) "to mean investment on such securities, and on such securities only, as are regarded by the court as proper for the investment of trust funds." See, also, *Woodruff v. Ward*, 35 N. J. Eq. (8 Stew.) 467 (at p. 471) (*Ordinary Runyon*, 1882).

While it is true that in each of the cases cited the court finds from the will evidence that the testator did not include in his designation of securities in which his funds might be invested stocks of companies, yet I think it unsafe to hold, in view of these decisions, that general language of this sort is sufficiently indicative of intention to exonerate the executor or trustee if he does invest moneys in stocks which depreciate and cause a loss to the estate.

If the complainants desire an affirmative authorization by this court for their investments they must appeal to the court in this or some proceeding and lay all the facts before the court.

I do not decide, because it is not now necessary, whether this court can or will authorize investments in stocks of companies. The act of 1899 (*p. 236*, heretofore cited) specifies the securities in which trustees may invest, but provides that the act shall not apply where a court having jurisdiction of the matter specially directs the manner in which trust funds shall be invested.

I cannot, in the present state of the proofs in this case, make any special direction, whatever power to do so I may have. Provision may be made in the decree for further application to the court, and under such permission this matter may be again brought to the attention of the court.

VIII.

Another matter concerning which instructions are sought is, with respect to commissions, paid by the complainants to real estate agents and others for procuring purchasers of real estate of the trust sold by the complainants.

I am of opinion that these commissions are payable out of principal.

IX.

Instructions are also asked concerning the costs, expenses, &c., of this proceeding.

That will be settled in the decree, and it is not necessary to refer to the matter in this opinion.

X.

Another head is with respect to a small item paid annually by the executors for the care and maintenance of the plot in which the decedent is buried in Greenwood cemetery.

There is no evidence before the court as to whether this was an obligation undertaken by the decedent, and, as such a debt of his, or whether it is a liability incurred by the executors them-

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selves, or what the fact is. If there was no obligation undertaken by the testator in this respect, and the executors have expended this small sum annually for the care of the plot, I do not see how it can be charged against the estate. However, this matter may also go to the master to take the proofs.

The decree will provide that the account of these trustees shall be taken and stated in this court, and a master will be appointed to take and state the same, and to said master will also be referred the various questions alluded to in the course of the opinion upon which further proofs are to be taken.

I will advise a decree as above indicated.

ALPIN J. CAMERON, executor, &c.,

v.

MARY JANE CROWLEY et al.

[Decided February 4th, 1907.]

A will authorizing the testator's daughter by her will "to dispose of" a fund "to and among" his grandchildren "in such shares and in such manner as she shall think right and proper," gave her a non-exclusive power of appointment, and hence the provision of her will, excluding two grandchildren in a *per capita* distribution of the fund, was invalid.

Heard on bill and answers.

This is a bill filed by Alpin J. Cameron. He is the surviving executor of the will of Alexander J. Cameron, and also the executor of the will of Alice E. Cameron. The defendants are the grandchildren of Alexander J. Cameron.

The object of the bill is to procure instructions concerning the complainant's duty as executor with respect to a matter arising under the wills of the two persons above named.

The will of Alexander J. Cameron contained a provision as follows:

"I direct that my said daughter, Alice E. Cameron, shall have power, and I hereby authorize and empower her, by her last will and testament, or writing in the nature thereof, to dispose of all the rest, residue and remainder of the said fund and proceeds of my share of said firm assets to and among my grandchildren, in such shares and proportions and in such manner as she shall think right and proper, as I have full confidence in her discretion and fairness."

The will of Alice E. Cameron contains a provision as follows:

"As my father, the late Alexander James Cameron, of Ridgewood, New Jersey, in his will stated that in case of my death that ten thousand dollars of the money he left should go to my sister, Mary Jane Crowley, I consider that her children, Mary Catherine Crowley and Daniel Cameron Crowley, are provided for, and would have their share in the estate of my father, the late Alexander James Cameron, and as the power has been given to me to divide the remainder of this said estate among the grandchildren as I might think proper and at my discretion, I think it right and just to make an equal division among the grandchildren now mentioned."

She named all of the grandchildren of Alexander J. Cameron except the children of Mary Jane Crowley, which latter are named Mary Catherine Crowley and Daniel Cameron Crowley.

The \$10,000 referred to by Alice E. Cameron in her will is referred to in the will of Alexander J. Cameron as follows:

"Upon the death of my daughter Alice E. Cameron, I direct that my said trustee shall pay to my said daughter Mary Jane Crowley the sum of ten thousand dollars, and upon such payment her said annuity shall cease."

His will also provided that

"in case my daughter Mary Jane Crowley should die before my daughter Alice, then her said legacy of ten thousand dollars shall lapse, and shall not be payable to her children, but in such event shall go to my daughter Alice, then her said legacy of ten thousand dollars shall lapse, and shall children as aforesaid."

The will of Alexander J. Cameron further provided, with respect to the power of appointment given to Alice E. Cameron, that

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"in case of her death without having disposed of it by her will or writing as aforesaid, I direct that it shall go and belong to my grandchildren, equally and *per capita*."

Answers are filed on behalf of all the defendants, the grandchildren aforesaid, excepting Alpin W. Cameron, who is a son of Alpin J. Cameron, the complainant, and a grandson of Alexander J. Cameron, the donor of the power, concerning whom the bill states that

"said Alpin W. Cameron has relinquished and surrendered his right, title and interest of said distributive share of said fund, and has instructed your orator to distribute the same among the other grandchildren."

The contention on behalf of Mary Catherine Crowley and Daniel Cameron Crowley, the children of Mary Jane Crowley, is that they, being grandchildren of Alexander J. Cameron, are within the class among the members of which the fund in question was to be distributed, and that since they are omitted from such distribution by the appointment contained in the will of Alice E. Cameron, such appointment is not a valid execution of the power vested in said Alice E. Cameron by Alexander J. Cameron, and therefore the said fund, in default of a valid appointment, must go in accordance with the will of Alexander J. Cameron and be distributed equally *per capita* among all of his grandchildren.

The answer of the other grandchildren is that the power of appointment was validly exercised, their contention being that the power was an exclusive one, and that Alice E. Cameron was vested with the right to exclude any of the grandchildren whom she might see fit to exclude.

Mr. Cornelius Doremus, for the complainant.

Mr. William Pennington, for the defendants Mary Catherine Crowley and Daniel Cameron Crowley.

Mr. Marshall Van Winkle, for the defendants Carrie L. Graydon and others, grandchildren of Alexander J. Cameron.

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GARRISON, V. C. (after stating facts).

The sole question is whether, under the language of the will of Alexander J. Cameron vesting power in his daughter Alice E. Cameron,

"to dispose of the fund in question to and among my grandchildren, in such shares and proportions and in such manner as she shall think right and proper, as I have full confidence in her discretion and fairness,"

an exclusive or non-exclusive power of appointment was vested in Alice E. Cameron.

The industry of the various counsel in this case has resulted in briefs citing cases from many jurisdictions concerning this subject-matter. I do not find it necessary, however, to consider any other than those in our own courts. It has been well settled in this court by the previous decisions thereof that such a power as is contained in the language just quoted is non-exclusive. *Lippincott v. Ridgway*, 10 N. J. Eq. (2 Stock.) 164 (*Chancellor Williamson*, 1854); *Wright v. Wright*, 41 N. J. Eq. (14 Stew.) 382 (*Chancellor Runyon*, 1886); *Inglis v. McCook*, 68 N. J. Eq. (2 Robb.) 27 (*Chancellor Magie*, 1904); see, also, *Den v. Crawford*, 8 N. J. Law (3 Halst.) 90 (at p. 98) (*Supreme Court*, 1825).

In *Lippincott v. Ridgway*, *supra*, the language "unto such of the brothers and sisters," &c., was held to give to the donee of the power discretion to select which of the said persons should have the fund, but in the same will the language "that my said daughter shall in such case have power to dispose of the same among her brothers and sisters and their children in such proportions as she may think fit" was construed to confer a non-exclusive power, and it was held that each of the brothers and sisters was entitled to a portion of the fund.

In *Wright v. Wright*, *supra*, the power "to dispose of the same between my children and grandchildren as she may think proper," was held to be a non-exclusive power.

And these cases were cited and approved in *Inglis v. McCook*, *supra*, in which it was held that the power to divide the same among the lawful issue of the donor as the donee should direct was a non-exclusive power.

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I cannot perceive any difference between the language of the various wills construed above and the language of the will under consideration in any substantial particular.

The power under consideration is to dispose of the fund *to and among* the grandchildren. It must, therefore, to satisfy this language, go *to* the said grandchildren and be disposed of *among* them. If one is omitted it has not gone *to* the grandchildren. I think, therefore, both upon authority and reason, that this must be held to be a non-exclusive power.

It is suggested that the use of the word "manner" by the donor implies the power of selection. The will provides that it shall go "to and among" the grandchildren "in such shares and proportions and in such manner" as the donee shall think right and proper. I cannot accede to this argument. The donor clearly indicates to whom it shall go, but leaves to the donee the power to determine the proportions and manner in which it shall go. The "manner" has reference to the way in which it shall be enjoyed, whether directly or in trust, immediately or at a postponed date, and other like matters.

If authority is needed for such construction of the word "manner," the following cases may be consulted: *White v. Wilson*, 1 *Drewry* 298; *Seibels v. Whateley*, 2 *Hill Eq.* 605 (S. C., 1837); *Cowles v. Brown*, 4 *Call* 477 (Va., 1803); *Hill v. Jones*, 65 *Ala.* 214 (1880); *Maitland v. Baldwin*, 70 *Hun* 267; 24 *N. Y. Supp.* 29 (N. Y., 1893); *Boyle's Estate*, 5 *W. N. C.* 363 (Penna., 1878).

It is also suggested that the fact that the donor recited in the clause granting the power that he had full confidence in the fairness and discretion of the donee is indicative of intention to vest in her the power of selection. I do not think this argument is sound. I think it does show that he intended to confide in her discretion and fairness as to the shares and proportions, and as to the manner in which the fund should be distributed. I do not think that it in any way indicates that because of his confidence he confided in her discretion the power of selection as to the persons. I may remark, in passing, that this whole matter has been set at rest in England by statute. *Powers of Appointment Act*, 37 and 38 *Vic. c.* 37 (1874).

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I conclude in this case that the power vested in Alice E. Cameron was not validly exercised by her, and therefore there is a failure thereof, and as a consequence the fund goes as is directed by the will of the donor of the power, and is distributable among all of his grandchildren equally, *per capita*.

Whether Alpin W. Cameron, the son of the complainant, who is a grandchild of the donor, has disentitled himself to a share by reason of the instrument referred to by the complainant in the bill I do not determine, since the instrument is not before me and the said Alpin W. Cameron is not a party.

I will advise a decree as above indicated.

RICHARD G. STEVENSON, administrator,

v.

PAUL H. MARKLEY et al., executors, &c.

[Decided March 7th, 1907.]

1. An amendment to a bill, intended only to strengthen matters alleged in the original bill, is not permissible under an order granting complainant leave to amend by inserting in the bill allegation excusing the delay in the bringing of the suit.

2. Whether a court will strike out a bill on the allegation of laches is a matter of discretion, and the court will generally permit the proving of the facts excusing laches and determine whether such facts excuse.

3. A suit by the representative of a deceased ward against the representative of the deceased guardian for an accounting is not properly cognizable in the orphans court, and is within the jurisdiction of a court of equity.

4. A guardian receiving property of a ward becomes a trustee for the ward until a proper accounting is had, and the fact that the ward acquires the right to call for an accounting at a particular time does not fix such time as a period from which either the statute of limitations or equitable principles in analogy thereto apply.

5. *Gen. Stat. p. 5*, concerning the action of account, gives a right of action for an account against a guardian, and *Gen. Stat. p. 1974 § 8* pro-

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vides that an action of account shall be commenced within six years next after the cause of action shall have accrued.—*Held*, that a suit in equity to compel a guardian to account is not barred by the statute. The fact that a court of law acquired jurisdiction by the statute did not affect the jurisdiction of equity previously existing.

6. A ward attaining her majority in 1883 died in 1885, before the guardian had rendered an account. The guardian died in 1905. In 1906 an administrator of the deceased ward was appointed, who, in the same year, sued the representative of the deceased guardian for an accounting.—*Held*, that the suit was not barred by limitations, though the cause of action accrued on the ward's death, since limitations did not begin to run until the appointment of her representative.

Heard on motion, under rule 213, to strike out bill.

Mr. Francis D. Weaver, for the complainant.

Mr. Howard M. Cooper and *Mr. Herbert A. Drake*, for the defendants.

GARRISON, V. C. (orally).

This is a hearing upon a motion made by the defendants for leave to withdraw their answer to the original bill, and to move to strike out the bill for want of equity, and various parts of the bill for specific reasons stated.

Upon a hearing had on the 10th day of December, 1906, it appeared to the court that the face of the bill disclosed a cause of action so old that, in default of explanation, the court would be inclined to dismiss the same for laches if the defendants had so moved the court. The court not finding among the reasons or objections of the defendants any one based upon laches, and the complainant moving for leave to amend by setting up facts explaining the laches, the latter motion was granted, and an order of the 10th of December, 1906, was entered. That order, in so far as it is now material, provided that the complainant "have leave to amend his bill by inserting therein such charges as he may be advised or able to do concerning the reasons for the delay in the bringing of his suit." And it was further therein ordered that all other proceedings should remain in *statu quo*.

Thereafter the complainant filed amendments, which he has

numbered 14*a* and 14*b*, and upon the amended bill the defendants have now moved, under rule 213, to strike out this bill and various parts thereof.

I am inclined to the opinion that the amendment numbered 14*a* is not within the permission of the order of the 10th of December. It does not seem in any way to set forth, or could it be considered as giving, a reason for the delay. It apparently is some additional allegation concerning some of the previous matters alleged in the bill, and is evidently intended to strengthen the charges of the bill in these respects. That was not within the purview of the order made on the 10th of December, and the complainant, under that order, cannot claim the right to make this amendment. If he has the right it must be asserted in a proceeding where that matter comes directly under consideration.

I will therefore grant the motion to strike out the amendment numbered 14*a*.

The other general heads are that the bill does not show equity; that because the thing sued for is a sum of money due the representative of a deceased ward by the representative of a deceased guardian, and is therefore an action of account, it is claimed by the defendants that suit must be brought thereon within six years, under the statute of limitations. It is also claimed that the complainant is in laches unexplained, and that there is therefore no equity in the bill.

It is further claimed that by the amendment 14*b* the complainant sets out another cause of action than that previously pleaded, and an incongruous one with respect to the latter.

I do not find that the complainant has changed his prayer in the least, nor that he prays any relief with respect to this matter as alleged in this paragraph. That matter seems to have been inserted wholly under the permission of the court as a reason or explanation of his delay in bringing suit upon the cause of action which is urged in the bill and for which appropriate relief is prayed in the prayer thereof.

With respect to the matter of the statute of limitations applying, I have examined this matter with great care, and have read most, if not all, of the authorities, and considered them very carefully. The matter is an open one in New Jersey, and is in

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grave doubt. I am rather inclined to think that our courts should follow the English and New York courts in holding that the relation of guardian and ward is a continuing trust, and that until the guardian settled with the ward or the ward's representatives it must be held to be a continuing, direct trust which is not affected by the statute of limitations. This, of course, is in a case where the guardian has not denied the ward's right and has not taken a position of antagonism, from the time of which open expression of antagonism the statutes of limitations or imputations of laches are always held to run. Therefore I am not going to strike this bill out, either for want of equity or because barred by the statute of limitations, or because the allegations of the amendment 14*b* are incongruous with the main cause of action set up in the original bill.

The defendants have answered so much as was in the original bill, and their answer may stand, if they so desire, or they may make a totally new answer to this bill as amended.

I do not wish by this decision to be understood as determining that the matter in 14*b* which is permitted to stay in the bill as an amendment is a satisfactory answer to the charge of laches, or that the court may not, on final hearing, reach the conclusion that there was laches, but I am disinclined to absolutely deprive the complainant of his day in court upon the ground of laches in the face of a charge in the bill that there was some sort of an agreement or understanding between him and the person whom he seeks to hold as trustee concerning the subject-matter of the trust which, when disclosed in detail, may explain or excuse the delay.

Whether a court will strike out a bill or sustain a demurrer—which is the same thing—upon the allegation of laches is, of course, a matter of discretion, and I do not think it would be discreet, legally speaking, to prevent this complainant from proving the facts, after which it will be entirely open to the court to determine whether such facts excuse or fail to excuse the long delay which has ensued in the asserting of his rights. I do not mean his rights as administrator, but his right, as husband of the deceased wife, to take all her personalty and to have administration. He had this right from the date of her death

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in 1885, and did not actually take out letters until 1906. It may be that upon final hearing the court will hold that his delay in this respect defeats his right. But, as just said, I think it more appropriate to consider and decide this upon final hearing, and after he has had opportunity to make proof of the excuses for delay that he offers.

The above was the oral deliverance of the court at the time of disposing of the motion at the argument. Having been notified that an appeal has been taken by the defendants, I think it due the reviewing court that a more extended statement of facts and law be given with respect to the important question disposed of.

The essential facts are as follows: Mary Josephine Markley was the mother of Mary Markley, and was appointed her guardian by the orphans court of Camden county about October 6th, 1876, and, as such guardian, there was paid to her for the ward the sum of \$4,087.14. Mary Markley, the ward, came of age on the 13th day of January, 1883. She married Richard G. Stevenson on the 26th day of March, 1885. She died on the 25th day of December, 1885. There was no accounting between her and her guardian. Her mother, the guardian, died on the 26th day of February, 1905. Richard G. Stevenson, the husband of the deceased ward, was appointed her administrator on March 1st, 1906.

This suit is for an accounting, and was brought by Richard G. Stevenson, the administrator of the deceased ward, against the executors of the deceased guardian, some time in the summer of 1906.

It is the contention of the defendants that this suit is barred, either directly by the statute of limitations or by the application by a court of equity of principles in analogy to the said statute.

It should first be observed that there are two periods to be considered and two different sets of parties, and that different principles are therefore applicable. First, there is the period between the coming of age of Mary Markley, the ward, on the 13th of January, 1883, and the time of her death on the 25th of December, 1885. During that period the parties concerned were the ward and the guardian. If the statute of limitations had begun to run then the death of the ward would not toll the same.

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This is too well settled to require citation. After the last-named date, and up until the death of the mother, the guardian, on the 26th of February, 1905, there was no one in existence in whom was vested the rights of the deceased ward against her guardian. Such a person did not exist until the 1st of March, 1906, when an administrator was appointed for the estate of the deceased ward. At that time the guardian had also died, so that the parties had completely changed, and the parties were, as above stated, an administrator of a deceased ward on one side and the executors of a deceased guardian upon the other. If the statute began to run at the death of the ward, notwithstanding that no administrator was appointed, then this suit is barred.

There are certain well-settled principles of equity which it is only necessary to refer to briefly.

A court of equity undoubtedly has jurisdiction over the accounts of guardians under the general jurisdictions over trustees, a guardian being held to be a trustee in the fullest sense of the word. *In re Hannah Barry*, 61 N. J. Eq. (16 Dick.) 135 (Vice-Chancellor Emery, 1900); *Sleeman v. Wilson*, L. R. 13 Eq. 36; 1 *Perry Trusts* § 430; 15 *Am. & Eng. Encycl. L.* (2d ed.) 75.

It is true that this jurisdiction will not be exercised saving in exceptional cases, and ordinarily an accounting between guardian and ward should take place in the orphans court. But I apprehend that the same rule with respect to the application or non-application of the statute would apply in the orphans court as in this court.

But the suit at bar is not one properly cognizable by the orphans court, because it is not between a guardian and ward, or between a guardian and the representatives of a deceased ward, but is between the representatives of a deceased ward and of a deceased guardian.

The determination of the whole question depends, in my view, upon whether the relation between a guardian and ward is held to be a trust relation—that is, a direct, continuing, subsisting trust. If it is, then the authorities are clear that the statute of limitations does not apply. There can be no doubt, I think, that the relation between guardian and ward is a trust, and is a direct, subsisting, continuing trust.

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Some courts, however, hold that the trust terminates at the majority of the ward (*15 Am. & Eng. Encycl. L. 82 note 1*), and others have even fixed the period of the termination of the trust, with respect to a female ward, at the date of her marriage. *15 Am. & Eng. Encycl. L. 82 note 1*.

In some jurisdictions, therefore, it is held that when the ward comes of age, or marries, the trust relationship ceases, and the statute of limitations, or principles in analogy thereto, apply, and an action will not lie for an accounting after the period of limitation provided. *15 Am. & Eng. Encycl. L. 82 note 1*.

But other courts hold that the relation is one of trust, and is direct, subsisting and continuing until there is an accounting. *Mathew v. Brise*, 14 Beav. 341; *Matter of Camp*, 126 N. Y. 377 (*Court of Appeals*, 1891). Although in a previous case in New York an opposite view had been distinctly taken and held in the case of *Bartine v. Varian*, 2 Edw. Ch. 348 (1832). This case was cited to the court in the *Camp Case*, and was, of course, disregarded. See, also, *Pyatt v. Pyatt*, 46 N. J. Eq. (1 Dick.) 285 (*Court of Errors and Appeals*, 1889).

The principle upon which these last-cited cases go is that where the guardian receives property belonging to the ward he becomes a trustee for the ward with respect to such property, and remains such trustee, subject to all the incidents thereof, until a proper account is had between him and the ward, and that the fact that the ward acquires the right to call for an accounting at a particular time, considered of course in connection with the concurrent right of the trustee or guardian to go into court of his own volition and account, does not fix such time as a period from which either a statute of limitations applies or equitable principles in analogy thereto are applicable.

There being no direct decision in this state upon this subject, we are free to adopt whatever view seems best. I think it best to assimilate this trust with all other like trusts, and to hold that so long as the guardian has the property of the ward—that is, so long as he has not accounted for it—he should be held as a trustee with a direct, subsisting, continuing trust, unaffected by statutes of limitations or principles in analogy thereto.

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I think the reasoning of the cases taking this view is more satisfactory than that of those which take an opposite view. I am also of opinion that the rule that I have laid down is the wiser one. It is certainly more equitable to each of the parties concerned. I see no reason why a guardian having property of the ward confided to his care should be treated in any different aspect than any other trustee to whom is confided the property of a *cestui que trust*. He has it in his power, when the ward comes of age, of ridding himself of the burden of the trust by taking the proper proceedings either in a probate court or in this court, or of course by a direct settlement with the late ward. I do not see that any good purpose is served by holding that the right which the ward has of calling the guardian to account should be construed as a strict legal right subject to the statute of limitations, and I do not think that it is within the spirit of such.

Speaking generally, those actions which are within the spirit of the statute of limitations are such as lie with an actor, and if he neglects or fails to take advantage of the legal procedure open to him for a fixed period, it is the policy of this legislation to end the right. But where trusts are concerned the situation is radically different. There, there is no one who must be the exclusive actor. Either party may, at any proper time, apply to the court and obtain full relief. Under such circumstances I can see no reason why a trustee should have protection after a stated period because the other party has not proceeded, it having been all the time within the power of the trustee himself to have proceeded had he seen fit.

Succinctly stated, the argument of the defendants is that the statute of account of this state (*Gen. Stat. p. 5*) gives the right of action for an account against a guardian, and that the statute of limitations (*Gen. Stat. p. 1974 § 8*) provides, *inter alia*, that all actions of account shall be commenced within six years next after the cause of action shall have accrued. Therefore they argue that we have a case in which there is a concurrent remedy at law and in equity, and the legal remedy is barred by the statute, whereupon a court of equity will hold that an action in

equity is likewise barred. It is unnecessary to cite any of the numerous cases which affirm this doctrine, but the doctrine is not applicable to the case in hand. The doctrine just contended for applies where the courts of law originally had jurisdiction and courts of equity subsequently obtained, or were held to have concurrent jurisdiction. There, as has been just stated, a statute of limitations which barred the right of action at law equally barred it in equity, but where the court of law did not originally have jurisdiction, the fact that it subsequently acquired it, and the action in it was barred by the statute, does not result in finding that the suit in the court of equity is likewise barred.

In the case of *Hedges v. Norris*, 32 N. J. Eq. (5 Stew.) 192 (*Chancellor Runyon*, 1880), it was held that the statute of limitations is not a bar to a suit in equity for the recovery of a legacy payable out of the personal estate only. In that case the chancellor held that an executor was a trustee with respect to the sum of money due the legatee, and that while that trust subsisted the statute of limitations did not run in favor of the trustee. The trustee insisted that the legislature, by the act of March 11th, 1774, had provided for the recovery of legacies by actions at law, and that thereafter courts of equity and courts of law had concurrent jurisdiction, and what would bar the action in one would have a similar effect in the other. To this the chancellor replied that equity had jurisdiction over legacies before the courts of law assumed it, and he pointed out that where a court of equity has jurisdiction and a court of law subsequently acquires concurrent jurisdiction, this will not serve to deprive the court of equity of its jurisdiction, nor to bind it by limitations which affect the action at law.

With respect to the matter of account at law, it will be found that the action only lay, so far as guardians are concerned, against guardians in socage. 1 Bouv. Dict. (Rawle's ed.) 64; 1 Encycl. Pl. & Pr. 84.

An interesting and instructive history of guardianship at common law will be found in *Foley v. Mutual Life Insurance Co.*, 138 N. Y. 333 (*Court of Appeals*, 1893).

In the case of *Green v. Johnson*, 3 Gill & J. (Md.) 389, it is

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said that "this action of account for rents and profits maintained by the heir after he had attained the age of fourteen against the guardian in socage was the only one, other than an action on the bond, that could be brought against a guardian, as guardian, in a court of law."

Ordinarily proceedings to require guardians to account must be brought in a probate court (*In re Hannah Barry, supra*), or in a court of equity if there was anything exceptional in the case requiring the interposition of a court of equity. It therefore appears that at a time when courts of equity, under their peculiar jurisdiction respecting trusts, undoubtedly had jurisdiction over the accounts of guardians the common-law courts only had a limited jurisdiction respecting guardians in socage. The effect, therefore, of the act of our legislature passed in 1794 vesting jurisdiction in the common-law courts of actions of account against guardians generally was not to divest the court of equity of its jurisdiction with respect thereto, and any limitations placed upon such common-law action do not, directly or by analogy, bind the court of equity.

Determining, then, that the relationship between a guardian and ward is a direct, subsisting, continuing trust, the conclusion is reached that, as between this ward and her mother down to the time of the death of the ward, there was no running of the statute and no application of principles of limitation analogous thereto.

The next question to be considered, therefore, is whether the statute began to run at the date of the death of the ward.

It will be observed that the second period previously spoken of by me is now under consideration.

I am of opinion that if, in this state, a cause of action, arising upon the death of a person, and not until his death, is barred if the statutory period begins to run at the date of his death, then this action or suit is barred. But I do not find that this is the law. In fact, the decisions are to the contrary. The authorities hold that where the cause of action did not exist during the life of the party, and came into existence subsequent to the party's death, the statute does not begin to run until the appointment of

a representative. *De Kay v. Darrah*, 14 N. J. Law (2 Gr.) 288 (at p. 296) (*Supreme Court*, 1834); 19 Am. & Eng. Encycl. L. 219 note 3 (at p. 220). The time between the death of the party and qualification of personal representative is not counted. 19 Am. & Eng. Encycl. L. 220 note 3; 2 Eng. Rul. Cas. 133 note; *Murray v. East India Co.*, 5 Barn. & Ald. 204 (1821); *Pratt v. Swaine*, 8 Barn. & C. 285; L. J. 6 K. B. 353 O. S. (1828); *Atkinson v. Bradford Society*, L. J. 59 Q. B. 360 (1890); *Rhodes v. Smethurst*, 6 Mees. & W. 351; 16 Eng. Rul. Cas. 146 (1840); *Pinckney v. Burrage*, 31 N. J. Law (2 Vr.) 21 (at p. 24).

My conclusions, therefore, are that as between guardian and ward there is a direct, continuing, subsisting trust until the guardian accounts; that the statute or implication of limitations does not apply thereto; that during the lifetime of this ward, after her coming of age and until her death, the statute had not begun to run; that at her death it may be proper to hold that the relation between the living guardian and the person entitled to call her to account was not a direct, subsisting, continuing trust outside the statute, but was a trust by implication, and therefore within the purview of limitations. But the limitation does not begin to run until there is a person entitled as representative of the deceased ward to call the guardian to account, and such a person in this case did not come into being until the appointment of the administrator of the deceased ward's estate in March of 1906. As this suit was brought almost immediately thereafter, it is, of course, not barred by the running of the statutory time against the administrator.

The motion to strike out the bill therefore fails.

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JOSIAH WHITE et al.

v.

ELLA ETTA SMITH et al.

[Decided March 7th, 1907.]

1. An enrolled decree may be opened on petition to permit the defendant to make a defence on the merits.

2. Where a decree was taken against a party without a trial on the merits as to a particular proposition in the case, it is within the discretion of the chancellor to open the decree and permit a defence on the merits of such question.

3. Evidence *held* to require a finding that an alleged lost deed executed by a son to his mother was not for the benefit of petitioners, and that they were therefore not entitled to open an enrolled partition decree for the purpose of claiming title to a portion of the property under such deed.

This is a petition by the defendants Ella Etta Smith and her husband, Rufus, praying that the enrolled decree in this suit may be opened, and they may be let in for further pleading. I phrase the matter in this way because that which they wish to set up is not, by way of defence, against the complainants, but relates to a controversy with co-defendants.

The decree is the ordinary decree in partition in which it is, *inter alia*, determined that the complainant owned one-third of the land in question, the defendant Ella Etta Smith one-third, and the defendants George H. Weaver and Josephine Maude Lake each one-sixth.

The petitioners bring before the court in this proceeding the proceedings in another suit pending in this court in which the defendants Lake are complainants and the petitioners, among others, are defendants.

From the pleadings, proofs and proceedings the following facts appear: Samuel W. Weaver was the owner, at the time of his death, of the land involved in the suit. He died in 1872, testate, his wife being the executrix of his will. He left a widow,

Josephine T. Weaver, and three children, Theodore S., Alphonso and Ella Etta. Alphonso died in April, 1888. After his death the land in question belonged equally, one-third each to the widow, Josephine T., Theodore S. and Ella Etta. Josephine T., on the 13th of September, 1897, leased the whole property for six years to Josiah White and another, with an option to buy. They exercised the option within time, and upon her refusing to convey they, on August 3d, 1903, brought a suit for specific performance, in which she set up that she only owned a third of the land in question, and that Ella Etta owned a third and Josephine Maude (Weaver) Lake and George H. Weaver, the children of Theodore S. Weaver, then deceased, owned the other third.

The court, in the specific performance case, decreed that Josephine T. Weaver should convey her interest, namely, one-third, to the complainants, and the other two-thirds were abated from the contract price, she receiving the one-third of the contract price for the one-third she conveyed. The decree in that suit was made on the 26th of May, 1904, was appealed and finally decided in favor of the Whites in March, 1905.

On May 26th, 1904, Josiah T. White & Son brought this suit for partition. They made Ella Etta (Weaver) Smith (she having intermarried with one Rufus Smith), Josephine Maude (Weaver) Lake (she having intermarried with one Lake), and their respective husbands, and George H. Weaver, defendants. The complainants in this bill alleged that they were the owners of an undivided one-third, and that Ella Etta Smith and her husband were the owners of an undivided one-third, and that Josephine Maude Lake and her husband were the owners of an undivided one-sixth, and George H. Weaver was the owner of an undivided one-sixth. To this bill Ella Etta Smith and her husband filed an answer admitting the allegations as to the ownership of the land, and a decree was made on the 18th of May, 1906, finding the ownership as aforesaid, and ordering a sale of the property. The property was sold in July of 1906, and bought in by Ella Etta Smith for \$15,535, and before the proceeds of the sale were paid over to the defendants Lake and Weaver notice was given by the solicitor of the Smiths to the

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solicitor of Lake and Weaver of an application to have the moneys due the latter defendants held in court to await the determination of the suit of such latter defendants against the Smiths and others. An order was made, by consent of the solicitors, so providing.

By their petition in this suit the Smiths set out that Theodore S. Weaver, on February 28th, 1889, gave a quit-claim deed unto Josephine T. Weaver for all his right, title and interest in the premises in question, and that

"such conveyance was made to said Josephine T. Weaver in order that she might, in turn, convey such interest unto your petitioner Ella Etta Smith in part payment of the moneys which the said Josephine T. Weaver, as executrix of the estate of Samuel W. Weaver, deceased, should have paid unto your petitioner Ella Etta Smith, but which in reality she had paid unto the said Theodore S. Weaver."

They then set out that this deed was lost in or about August, 1903, and that they were advised that by reason of the loss the interest of the said Theodore S. Weaver reverted to his heirs-at-law, namely, the said George H. Weaver and Josephine Maude Weaver Lake. They then set out that they did not know, nor were they advised that it was possible to re-establish such lost deed until the latter part of the month of November, 1905, and that thereupon they caused proceedings to be instituted on the 11th day of December, 1905, in the supreme court of this state for the purpose of establishing the lost deed in accordance with the statute. That on the 26th of December, 1905, George H. Weaver and Josephine Maude Weaver Lake, together with the husband of the latter, instituted a suit in this court in which they set out the commencement of the proceedings by Josephine T. Weaver in the supreme court, asked that such proceedings be perpetually restrained, and further prayed that by the decree of this court the defendants Josephine T. Weaver, Rufus Smith, Ella Etta Smith and Laura Coston might be forever restrained from in anywise setting up any claim to the one-third interest in the lands and premises formerly owned by Theodore S. Weaver.

The petition alleges that so much of the decree in this suit is erroneous as adjudges that George H. Weaver and Josephine Maude Weaver Lake are each seized and entitled to an undi-

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vided one-sixth of the land, and further charges that they are not entitled to any interest in said land.

The prayer of the petition is that the final decree be opened and they be granted a rehearing, or else that said decree be permitted to stand open until a final decree shall have been made in the case of *Lake v. Weaver* above mentioned.

Messrs. Melosh & Morten, for the petitioners.

Mr. John J. Crandall, for the respondents.

GARRISON, V. C.

While this petition may not be artistically drawn, the purpose of the petitioners is quite obvious. Having pleaded by their answer in this suit that the children of Theodore S. were entitled to a one-third interest, and the decree in the suit, in which they were all parties, having adjudged that fact, the petitioners desire now to have that decree opened so as not to be concluded thereby.

The first question to be considered is whether it is proper practice to seek by petition to open an enrolled decree for the purpose of giving the defendant an opportunity to make a defence on the merits. I conclude that under the authorities it is proper practice, and I endorse and agree with my brother Stevenson, who said: "In my opinion, the application by petition in the cause to vacate the enrollment and open the decree is to be encouraged, if not exclusively prescribed in all cases where such procedure will accomplish justice." *Kearns v. Kearns*, 70 N. J. Eq. (4 Robb.) 483.

The next matter for consideration is under what circumstances the prayer of such a petition will be granted.

In *Brinkerhoff v. Franklin*, 21 N. J. Eq. (6 C. E. Gr.) 334 (*Chancellor Zabriskie*, 1871), it was said (at p. 336): "It has long been settled that an enrollment will be vacated and a decree opened when the decree has been made unjustly against a right or interest that has not been heard or protected, when this has been done without laches or fault of the party who applies." Citing cases.

In *Embury v. Bergamini*, 24 N. J. Eq. (9 C. E. Gr.) 227

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(*Chancellor Runyon, 1873*), speaking with respect to a default decree after an enrollment, the court said that it would be opened "for the purpose of giving the defendant an opportunity to make a defence, where such defence is meritorious, and he has not been heard in relation thereto, either through mistake, accident or surprise."

In *Day v. Allaire, 30 N. J. Eq. (3 Stew.) 231*, the court of errors and appeals said: "The court of chancery has discretionary power, even after enrollment, to open a regular decree obtained by default, for the purpose of giving the defendant an opportunity to make a defence on the merits, where he has been deprived of such defence, either by mistake or accident, or by the negligence of his solicitor."

In this last-cited case an answer was interposed by the defendant and testimony taken, but her solicitor abandoned the case without her knowledge, omitting and refusing to take testimony of several material witnesses, and did not present the evidence taken or argue the case before the chancellor; in that sense the decree was taken by default.

In the case at bar an answer was interposed but no question of merits concerning the subject-matter contained in this petition was raised by the answer. In that sense it may be said that this decree was taken by default on that point.

It is alleged in the petition that the reason for not setting up the facts which were perfectly well known to the defendants concerning this deed was because their solicitor advised them that when the deed was lost all rights of the grantee thereunder were also lost. This, of course, is not the law, since equity has jurisdiction to establish a lost deed. *Kent v. Church of St. Michael, 136 N. Y. 10; 19 Am. & Eng. Encycl. L. (2d ed.) 555*. And the remedy by statute is concurrent or cumulative. *19 Am. & Eng. Encycl. L. 556*.

In *Warner v. Warner, 31 N. J. Eq. (4 Stew.) 549 (Vice-Chancellor Van Fleet, 1879)*, and in *Perrine v. White, 36 N. J. Eq. (9 Stew.) 1 (Chancellor Runyon, 1882)*, (affirmed, *36 N. J. Eq. (9 Stew.) 632*), it was held that errors of judgment or mistakes of counsel are not valid grounds for granting a rehearing, and cases in other jurisdictions holding that the errors or

negligence of counsel must be attributed to the client are collected in *16 Am. & Eng. Encycl. L.* (2d ed.) 392.

It will be seen that the precedents and authorities do not lay down any hard and fast rule, and I think that this is by design and not from indecision. I think it is a matter left to the discretion of the court in each case, so that when merits and hardship are shown an inflexible rule will not prevent relief.

Upon the question of merits in the case at bar it is necessary to rehearse certain facts before a decision can be stated.

There is no doubt from the proofs that Theodore S. Weaver gave to his mother, Josephine T. Weaver, a quit-claim deed for his one-third interest in the property owned by his father at the time of his death, and that such deed was dated on or about the 28th day of February, 1889. There is no doubt that the defendant Ella Etta Smith knew of this deed practically from the day of its delivery. This deed was in existence and was exhibited to the solicitor who represented Mrs. Josephine T. Weaver in the specific performance case begun by the present complainants against her about August 3d, 1903. It was lost shortly after that time.

Josephine T. Weaver, it will be recalled, was the executrix of her husband, and she, her son Theodore and her daughter, Ella Etta, were each entitled to one-third of whatever he left. It appears from her testimony that in February of 1889 she and her son Theodore went over their mutual accounts and discovered that he had drawn a sum of money which they treated as having come to him from her as executrix. It is quite plain that since there was no settlement of the estate in the probate court, and no ascertainment of the indebtedness of the executrix to the legatees, it cannot be definitely ascertained what, if anything, the executrix owed the legatees. I think, however, that it appears undisputed in the case that the mother had given Theodore moneys, and that, as between themselves, they assumed that they were on account of his interest as legatee under his father's will, and that such advances by her to him were in excess of what they then figured would be the amount eventually owing to him by her as executrix. The only living person who can give any evidence concerning the circumstances of the making and

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delivery of this deed is Mrs. Josephine T. Weaver, and her testimony thereon is as follows. Speaking in respect to her son Theodore, she said:

"After the settlement with him and myself he discovered and I discovered (to my astonishment, I will say) that he had overdrawn considerably what belonged to him, and he said to me, 'I suppose Ella and Rufus will kick about that, that you have allowed me to overdraw so far;' I said—well, I don't remember just the answer I made to it, but he says, 'All right, mother; I will make it all right; there shall be no hard feeling in our family; I will give you a quit claim deed to my interest in the old farm to make up to Ella what I have overdrawn on her share.'"

In other words, he gave to his mother, from whom he had procured what they determined was an excess of money over what was coming to him, this deed in payment or satisfaction of what he owed her, or perhaps as security therefor. It entirely lay with her as to what she should do with the property thus conveyed to her. She could either accept and retain it, or could refrain from accepting it if she so desired. She could undoubtedly have conveyed it to Ella Etta in satisfaction of what she, as executrix, owed her, or could have declared a trust in her behalf, or could have sold it, and either kept the proceeds or paid them or some part of them to Ella Etta on account of her share; or she could have destroyed the deed, and thus divested herself voluntarily and intentionally of the interest thereby conveyed to her; or could voluntarily and intentionally have refrained from recording it for the same purpose.

No express trust in favor of Ella Etta was created by the deed or by the conduct of the mother and Theodore. No implied trust in favor of Ella Etta arose out of the circumstances. Theodore's dealings were with his mother, who was acting either individually or as executrix. What he owed he owed to her in one or the other of these capacities, and what he gave he gave to her. If she chose not to accept the benefit thereof no one else has any legal right to complain.

What Mrs. Weaver did after the deed was delivered to her is therefore of the utmost importance, and what the defendant Ella Etta did, in view of her knowledge and her present claim, is also important.

Mrs. Weaver received this deed in 1889, and does not claim to have lost it until 1903. During these fourteen years she did not record the deed, and never did anything to show that she intended to exercise any rights vested in her by the deed. While, standing alone, this failure to record might not be determinative, it certainly is some evidence of her attitude toward the matter. If she intended to accept the property from her son it is curious that she did not record the deed. If it was intended that she should convey the property to Ella Etta, as is now contended, there is no scintilla of proof as to why this was not done.

Ella Etta knew all the time of the deed, and if it be true that what she now says was the fact, she knew all the time that it was intended that this property was merely conveyed to her mother as a conduit through whom it was to reach her. Why she did not see to it that her mother conveyed to her is not in any way explained, nor is there any suggestion of a reason. The deed was still in existence and in the possession of Mrs. Weaver during the time in 1903 when the Whites, the complainants in this suit, began their action for specific performance against Mrs. Weaver. As before explained, she had agreed to convey the whole property to them for something over \$8,000. In her answer she pleaded that she only owned one-third of the property and the children of Theodore owned another third and her daughter, Ella Etta Smith, a third. Here is confirmatory and determinative evidence that she did not intend to take the benefit of the conveyance of her son's interest to her, and also evidence entirely at variance with the present contention of these petitioners.

Later in the year 1903 her daughter, Ella Etta, procures from her mother a bond for a sum alleged to represent the amount due by her mother as executrix to her, and subsequently judgment was entered on the bond and an execution issued and a sale had thereunder, and the property, namely, the real estate in question in this suit, which was levied on and sold, was conveyed through an intermediary to Ella Etta. The giving of this bond and warrant is entirely consistent with the idea that Mrs. Weaver owed her daughter, as executrix, the sum of money represented thereby, but is entirely inconsistent with the idea that the prop-

2 Buch.White v. Smith.

erty conveyed to the mother by Theodore belonged to Ella Etta, and really was Ella Etta's share of the personal property previously absorbed by Theodore.

It is inconceivable upon any rational theory of conduct that at a time when the mother held title to Theodore's third for the benefit of Ella Etta, and was merely a dry trustee with no duty to perform saving to convey to Ella Etta that she should not only not convey, but should confess judgment for the sum which, as executrix, she admitted she owed.

The taking of this bond and warrant by the daughter casts a strong light upon her attitude toward the subject-matter of inquiry, and what has just been said need not be repeated. If her present contention is sound, and she was entitled to a conveyance from her mother, she has not even suggested a reason why she did not proceed to obtain the same rather than to recognize that the matter was an open one and proceed against her mother by bond, warrant, judgment and execution.

Furthermore, we have, as in the case of the mother, conclusive proof of the state of mind of the petitioner in her answer in the suit at bar. Therein, as previously recited, although she had full knowledge of all the facts, she admits the ownership by the children of Theodore of one-third of the land in question. Her only explanation of this is that she was advised by her then counsel that when the deed was lost all rights thereunder were lost.

That a client is bound by the errors or mistakes of her attorney or solicitor is sustained by abundant authority heretofore cited, and it is also to be remarked that the absence of this solicitor as a witness in this suit is very suspicious and reflects seriously upon the good faith of the petitioners herein. This counsel is in active practice in this state and is easily reached by subpoena to testify. It is almost unbelievable that he could have given these petitioners the advice which they say he did. In view of the principles of equity which protect those who have suffered the loss of a deed before record, and in view of the express provisions by statute, it is very difficult to believe that a lawyer in active practice and of good standing at the bar should have advised clients that when a deed is lost all rights under it are lost, and yet this is the bald, unqualified statement that they

contend was made to them. It would require strong and convincing proof that the fact is as they assert, and no reason is given to the court why this attorney was not subpoenaed as a witness to furnish the best evidence of the fact.

It seems much more likely to me that the counsel in question reached the conclusion which I have reached, namely, that the deed to Mrs Weaver gave her a right which she voluntarily chose to abandon, and by her conduct had shown that she had abandoned, and it was, therefore, no concern of these petitioners, because they had no rights with respect thereto.

However this may be, I am clear that parties who have conducted themselves with respect to a subject-matter as these petitioners have should not be permitted at this time, in view of the results which would ensue, to change and alter their previous position in the way which they now desire to do.

In passing, I think it proper to remark that a curious effect results to the complainants by permitting the defendants to set up this matter in this suit now. The complainants had the contract with Mrs. Weaver for the whole property. In the specific performance case she answered that she only had a third. The court therefore only decreed a third to be conveyed. The defendants now set up that at that time she had two-thirds. The proofs show that the property is at least twice as valuable now as it was at the time the contract was made between Mrs. Weaver and the complainants; the result to the Whites would be that by reason of Mrs. Weaver's answer in their suit they were only able to secure a conveyance of one-third of the property from her, although at that time she had title to two-thirds, and could and would have been compelled to have conveyed two-thirds to them if she had truly represented the facts in her answer.

And this obvious illustration of the effect of permitting parties to untruly answer without being bound by their answers, and subsequently, when it serves their purposes, to suffer them to set up statements directly opposed to statements made by them in previous pleadings, is, I think, a cogent and striking reason against the court's allowing such procedure.

If the defendants claim that by reason of the sale under the execution issued upon the judgment of *Ella Etta* against her

*2 Buch.**White v. Smith.*

mother and the transfer by the purchaser at that sale of the title, they obtained the legal title which Mrs. Weaver had theretofore owned, and that therefore they owned the legal title at the time of this suit, I think they have shown no reason for not setting that up. They do not suggest that their attorney or solicitor advised them that, owning a legal title, they could not plead it.

And what has just been said applies equally to whatever rights they acquired by a deed dated in April of 1905 from Mrs. Weaver to Ella Etta Smith.

Previous, however, to making this deed, Mrs. Weaver had quit-claimed to a purchaser from Josephine Lake whatever interest Mrs. Weaver had in the lands contracted to be sold by Josephine Lake to such purchaser, one Martin Keane. And here again is a strong reason against permitting these petitioners to now alter their attitude concerning the title and ownership of this property. After Mrs. Weaver, the grantee in the deed from Theodore, admits upon the record by her answer that the children of Theodore have title, and Mrs. Smith and her husband, with full knowledge of the deed, likewise, in an answer, concedes the title is in Theodore's children, and the decree in this suit likewise so adjudges, and one of the children contracts to sell her share to a stranger, and Mrs. Weaver quit-claims to such stranger, then these petitioners desire to completely change their own attitude toward this title and all that their answer and that of their mother have admitted, and the decrees of this court based thereon have adjudged, and open up all the controversies which this course would give rise to.

My conclusion is that these petitioners have not shown themselves entitled to open this decree for the purpose of setting up rights under the deed in question. I think to permit them to do so would be to put a premium not only upon carelessness and laches, but upon false pleading and the lack of honesty and candor. The only explanation which squares itself with all of the conduct of the parties is that Mrs. Weaver, for reasons satisfactory to herself, determined not to take the benefit of this conveyance. She thus conducted herself from the beginning. I find that it entirely lay with her whether she would accept this property as her own or not. I find from her conduct that she, at

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least so far as these defendants are concerned, so conducted herself that they have no interests because of the conveyance of Theodore to her.

The prayer of the petition will be denied.

CLARENCE B. ISERMAN

v.

THE INTERNATIONAL STOKER COMPANY.

[Decided March 15th, 1907.]

Persons were stockholders and not creditors of a corporation, where they received stock under a resolution in the handwriting of one of them, directing its issuance to them for advances, and retained it over four months, when they attached the certificates to their respective claims filed with the corporation's receiver; the papers in a suit by one of such persons in which the receiver was appointed reciting that they were stockholders, and not disclosing the amount of such advances as debts of the corporation, though a schedule of the corporation's debts was set out.

On appeals from receiver's determination.

The main suit was a proceeding under the Corporation act to have the company declared insolvent and an injunction issued and a receiver appointed.

The injunction was issued, and the receiver appointed on the 13th of November, 1905.

On the 26th day of February, 1906, Clarence B. Iserman and Harvey Iserman presented claims to the receiver, the former for the sum of \$1,200 and the latter for the sum of \$1,686.77. Attached to each claim was a certificate of stock of the defendant corporation. Clarence B. Iserman's certificate called for one hundred shares, and was dated October 20th, 1905, and Harvey

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Iserman's certificate called for two hundred and seventy shares, and was dated the same day.

The receiver disallowed the claim of Clarence B. Iserman for \$1,000 and allowed it for \$200. He disallowed the claim of Harvey Iserman for \$1,468.29 and allowed it for \$218.48. •

Each of these claimants has taken an appeal from the determination of the receiver.

Other creditors have taken appeals from so much of the receiver's determination as allows anything to either of the Isermans.

The case was heard upon the testimony taken before the receiver, together with the exhibits and documentary evidence.

Mr. George G. Tennant, receiver, *pro se*.

Mr. Cornelius Doremus, for Harvey Iserman and Clarence B. Iserman.

Mr. Boyd McLean, for Paul L. Crowe, a stockholder and creditor.

GARRISON, V. C. (after statement of issues).

The reason given by the receiver for disallowing so much of the claim of each of these claimants as he did not allow was that they had each taken stock in the company in liquidation or satisfaction of so much of the claim as was disallowed.

There is no dispute that each of these claimants advanced the amount of money each claims to have advanced. Their contention, however, is that they are entitled to be considered as creditors for such sums of money, whereas the contention of their opponents is that, with respect certainly to a portion of the moneys so advanced, they agreed to accept, and did accept, stock of the company in payment thereof.

Harvey Iserman was secretary and treasurer of this company during the period subject to inquiry. On the 9th day of August, 1904, an agreement in writing was entered into between Paul L. Crowe, Harvey Iserman and Clarence B. Iserman. This agreement recites that Crowe is the owner of a large block of the stock

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of the International Stoker Company; that the Isermans desire to purchase stock of Crowe; that Crowe thereby agrees to sell to the Isermans twenty-five shares for \$500, said money to be used in installing a stoker in the building of the Commercial Trust Company in Jersey City; that if said stoker is not a success, then the International Stoker Company is to return the money to the Isermans and the stock is to be surrendered; that if the stoker is a success, then Crowe agrees to sell to the Isermans four hundred shares, or any part thereof, at any time within six months after the trust company accepts the stoker, the said stock to be sold at \$20 a share; and it is further provided that in case the said stoker is accepted by the trust company, and more money is required to develop and install other stokers before stock can be sold, the Isermans agree to furnish or obtain the money by taking the stock upon which they were given the option for the amount of cash they might advance, not exceeding \$3,000, the judgment of the board of directors of the company to be binding as to the amount of money needed. There are other provisions in this contract which it is not necessary to recite.

In June, 1903, it was determined to double the authorized capital of the company, and on the 17th of October, 1904, there is a resolution of the board of directors, of which Harvey Iserman was a member, in which it is provided that certain stock shall be returned to the treasury for sale for the benefit of the company.

"Also, the option given to H. Iserman 200 shares; Clarence B. Iserman 200 shares.....be doubled owing to the increase of capital stock and placed in the treasury for the purpose above stated, and if said options are not taken either in part or in whole by the said persons [naming them] the stock to be sold and proceeds placed in the treasury as aforesaid."

At this meeting the claim of Harvey Iserman for money advanced was audited, and he was shown to be a creditor for \$700.

Between that meeting and the 25th of September, 1905, Harvey Iserman advanced moneys which, in addition to the \$700, made his total advance about \$1,500, and Clarence B. Iserman

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advanced \$500 on the 13th of February, 1905, and \$500 on the 13th of May, 1905.

On the 25th of September, 1905, the following preamble and resolutions were adopted by the board of directors:

"Whereas, Clarence Iserman has taken up 100 shares of the option given to him according to a certain contract with Mr. Crowe, and having paid the treasurer \$500 February 13th and \$500 May 13th, for which he holds receipts with a statement that the certificates of stock will be given him when issued; therefore, it was unanimously

"Resolved, That the certificates of stock be issued and given to him.

"Whereas, H. Iserman has advanced about \$1,500 to carry on the business of the company, said money being payment on the options of stock given by Mr. Crowe as per a certain agreement; therefore, be it

"Resolved, That certificates of stock be issued and given to H. Iserman for the amount advanced, according to the terms of the option."

There are numerous provisions in the same resolution, among them one by which Clarence B. Iserman and Harvey Iserman give up the balance of their options, amounting respectively to three hundred shares and two hundred and fifty shares, so that the stock is to go into the treasury of the company and be sold by it, and the Isermans are to receive any sum realized over \$25 a share, and there is a further provision that Crowe is to put a thousand shares of stock in the treasury, to be sold at an advance over \$20 a share.

The company failed to pay the fee for filing the amended certificate authorizing the increase of the capital stock, and therefore the company at this time had not the right to issue the additional stock, and did not acquire the right until some time after these resolutions were passed, when the fee was paid and the company then was authorized to issue the stock.

The testimony is clear that all of the transactions between the Isermans and the company were carried on by Harvey Iserman. He is the father of Clarence B. Iserman, who was a young man just past his majority.

It seems too plain to require extended consideration that by this resolution (which, in passing, it may be remarked is in the handwriting of Harvey Iserman) it was agreed and understood between the parties that each of the Isermans was to receive from this company stock for the advances made by them up to

that time, and all of the oral testimony bears out the righteousness of this conclusion. Clarence B. Iserman was to receive one hundred shares of stock for his \$1,000, and Harvey Iserman was to receive the proper amount of stock for his \$1,500. The reason why the stock was not then issued to them has just been stated.

Stock was actually issued to each of the Isermans on the 20th day of October, 1905. It was retained by each of them until the 26th day of February, 1906, when they attached the certificates to their respective claims to the receiver and delivered them with the claims.

On November 3d, 1905, the main suit was instituted by Clarence B. Iserman. The bill recites that Clarence B. Iserman is a stockholder of the defendant corporation, holding one hundred shares therein, "for which he paid \$1,000 cash." The bill refers to a schedule showing the debts of the company, and such schedule contains no item due Clarence B. Iserman, and recites a claim of Harvey Iserman for \$353.48. In an affidavit annexed to the bill Harvey Iserman swears that he

"now owns 270 shares of the stock of the said company, and that Clarence B. Iserman, the complainant in the foregoing bill of complaint, is now the owner of 100 shares of the stock of said company, and that said company is indebted to various creditors whose names are contained in the schedule B annexed to the said bill, with the amount due in each case set opposite their respective names."

As has just been stated, said schedule does not refer to Clarence B. Iserman as a creditor at all, and only claims on behalf of Harvey Iserman \$353.48.

As has been previously stated, the receiver was appointed on the 13th day of November, 1905, and on the 11th day of January, 1906, he sold all the assets of the company, and on the 26th day of February, 1906, the claims of the Isermans were filed, each having annexed to his claim the shares of stock issued to him.

The claimants seek to break the force of the facts just recited, which so clearly indicate that they were stockholders and were not creditors, by claiming that their standing as stockholders or creditors should be determined with respect to certain agreements between them and Crowe and the company sought to be

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completed on the 20th of October, 1905. It is shown that there was a series of agreements which had been talked over between the parties, and which were intended to be executed on the 20th of October, 1905. I shall not take time to recite what these contemplated agreements were, or to consider whether the claim of the Isermans with respect to their rights under those agreements would have been well founded or otherwise if said agreements had ever been consummated. My reason for disregarding those agreements and the arguments based thereon is that I find as a fact that prior to the time that those agreements were in contemplation the Isermans had agreed with the company to accept stock for the sums of money advanced up to the 25th of September, 1905. I can find no evidence in the suit which even tends to prove that at the time the Isermans agreed in September of 1905 to take stock under their options for the moneys advanced there was any qualification or contingency, or that the matters subsequently attempted to be included in the contracts of October 20th were even broached. In fine, I cannot see any connection whatever between the completed arrangement of September 25th, 1905, and the unsuccessful and uncompleted arrangement subsequently attempted to be consummated on October 20th, 1905.

The result is that the determination of the receiver is sustained with respect to the amounts disallowed, and the appeals of the Isermans are dismissed.

With respect to the sums of money advanced by either of the Isermans to the company after the 25th of September, 1905, I do not think it anywhere appears that they had agreed to take stock therefor, or that in advancing these sums they were exercising any option to take stock. I therefore think the receiver's determination is correct in so far as it finds the Isermans creditors for sums advanced to the company after the 25th of September, 1905.

I have not sufficiently examined the accounts in detail to determine whether there are any sums allowed by the receiver to the Isermans which are not proper. It may be that some of the sums claimed were not advanced to the company, or were advanced to the company prior to September 25th, 1905. If so,

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that matter can be adjusted upon settling the final decree or order with respect to these appeals. Such settlement may be made upon notice.

MANCHESTER BUILDING AND LOAN ASSOCIATION

v.

J. FRANK BEARDSLEY et al.

[Decided March 16th, 1907.]

1. The by-laws of a building and loan association provided that the secretary shall receive all moneys from members and others, and pay the same to the treasurer, who shall receive and hold for the association all moneys and securities. One who borrowed from an association received the money from its president, who transacted all the business relating thereto. Arrangements were made with the president to pay the loan, and pursuant to his directions the borrower went to his office, where he found the bond and mortgage. Payment was made to the president, who then tore the seals from the mortgage and endorsed a certificate of cancellation thereon.—*Held*, that the borrower and the holder of a second mortgage, who furnished the money to pay the loan, could assume that the president was authorized to receive the money and endorse the certificate of cancellation.

2. In a suit by a building and loan association to foreclose a mortgage which had been canceled by its president, to whom the money had been paid, but who had failed to pay it to the association, evidence *held* to show that the negligence of the association and its officers was the proximate cause of the loss, which must be borne by the association, and that the mortgage was properly canceled.

3. *2 Gen. Stat. p. 2107 § 23* provides for entry by the clerk on the margin of a registered mortgage of a minute of its discharge. Section 25 provides that a mortgage registered or recorded shall be discharged by an acknowledged certificate, which shall be recorded. *Revision of 1846 (Nis. Dig. pp. 526, 527), Act to Register Mortgages §§ 1, 5*, the words "record" or "recording" are used synonymously with "register" or "registering." In 1858 (*P. L. 1858 p. 90*) a supplement to the act to register mortgages provides for their being registered or recorded in full.—*Held*, that the method provided in section 25 is not exclusive, but that the one contained in section 23 is equally effective.

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Heard on bill, answers, replications and proofs.

This is a bill to foreclose a mortgage made by Beardsley to the complainant.

The defendants are Beardsley, Baker, who is the holder of a mortgage upon the same premises, and Shippee, who is the present holder of the title to the property in question.

Mr. Jacob W. De Yoe, for the complainant.

Mr. W. Carrington Cabell, for the defendants.

GARRISON, V. C.

The defendant Beardsley, on the 14th of June, 1901, made application to the Manchester Building and Loan Association for a loan in the sum of \$1,800. Up to this time he was not connected with the association as a shareholder. His application was acted upon favorably, and he became a shareholder of nine shares, and executed a bond and mortgage, dated July 8th, 1901, to the association to secure \$1,800. This mortgage was recorded in full in the clerk's office of Passaic county on the 12th of September, 1901. All of the business which Beardsley then transacted with the association was done with William H. Belcher, its president. Belcher had been president of the association for many years. Allee had been its secretary and Roe its treasurer during the same period. The association met at Haledon, in Passaic county. Belcher, its president, practiced law in the city of Paterson, and in his office there there was also an office of the building association; its name was on the door, and its safe was in Belcher's private office.

In December of 1902 Beardsley arranged with one Baker to borrow money from him and mortgage the property to him to secure the loan, and, with the money thus borrowed, to pay off the building and loan association mortgage.

Having been informed by Belcher that if he came to the office in Paterson on the 2d of January, 1903, the business could be transacted, Beardsley, Baker and an attorney procured by Baker to protect his interests attended there upon that day. Beardsley

had previously sent in his pass-book to be balanced, and when they got there it was figured up how much was due upon the bond and mortgage, and Baker gave his check to Beardsley for the amount, which check Beardsley endorsed and turned over to Belcher, who endorsed upon the mortgage, after tearing the seals off of the mortgage, the following language:

"This mortgage is paid and satisfied, and the clerk of Passaic county is hereby authorized to cancel the same of record. The Manchester Building and Loan Association, W. H. Belcher, President. Dated January 2d, 1903."

The mortgage thus endorsed and mutilated, together with the bond, which was similarly mutilated by having its seals torn off, were then delivered to Beardsley or Baker.

The mortgage, on the same day, was taken to the clerk of Passaic county, who made the following entry upon the margin of the record of the mortgage:

"This mortgage, given by J. Frank Beardsley to the Manchester B. & L. Assn., is this 2d day of January, A. D. 1903, canceled of record, the same being produced before me canceled, the seals removed and satisfaction endorsed thereon by Manchester Building and Loan Association, W. H. Belcher, president; Jno. J. Slater, clerk. Dated January 2d, 1903."

At the same time a mortgage from Beardsley to Baker for \$1,600 was filed to secure the money which Baker had just advanced.

Later in the same year another mortgage, to secure \$500, was given by Beardsley to Baker, which was duly recorded.

On the 17th day of November, 1904, Beardsley conveyed the lands in question to David N. Shippee, who paid \$700 in cash, and, of course, took the land subject to the mortgages of Baker aggregating \$2,100. In July, 1905, Belcher, the president of the building and loan association, absconded, never having paid into the association's treasury the money received on account of this mortgage. Among the papers in the safe of the building and loan association at its office in Paterson there was found, after Belcher's departure, what purported to be a bond and mortgage from Beardsley to the association. The witness in each of these papers is William H. Belcher. The irresistible

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conclusion is that Belcher substituted at some time this forged bond and mortgage for the genuine bond and mortgage, which, as before stated, were delivered by him to Beardsley or Baker on the 2d day of January, 1903. There is also an irresistible conclusion that Belcher continued to pay into the treasury of the association the dues and interest upon the Beardsley stock and loan after the receipt of the principal due on the mortgage. Beardsley certainly did not continue to make these payments, as he assumed that when he paid the mortgage off all of his connection with the association ceased, and he did not consider that he was any longer a stockholder. The dues were paid, and, therefore, the conclusion must be that Belcher paid them. Of course, it is easy to conjecture why he made such payments, because, by so doing, there would not be any occasion to investigate the Beardsley loan or to commence foreclosure proceedings upon the mortgage, which, to his knowledge, was canceled, and in place of which he had substituted a forged mortgage.

After Belcher's departure and a default then occurring in the payment of dues upon the Beardsley stock, the building and loan association commenced this foreclosure suit. It made as parties Beardsley, Baker and Shippee.

The complainant seeks to foreclose the mortgage notwithstanding the payment of the full amount due thereon to the president of the complainant association and the cancellation thereof by the said president, by claiming that the payment was not made to the proper officer so as to bind the association, and that the cancellation was not made by the proper officer so as to similarly bind the association. The contention on behalf of the association is that Beardsley was a member or shareholder; that the by-laws provide that the secretary

"shall receive all moneys from the members and others, and without delay pay the same over to the treasurer, taking a receipt therefor. He shall keep accurate account with all shareholders and others doing business with the association. He shall give such bonds as shall be satisfactory to the board of directors,"

and that the treasurer shall receive all moneys, pay all orders, and

"shall receive and hold in trust for the association all bonds, mortgages, * * * and other securities upon which money may have been loaned by the board of directors."

They argue, therefore, that Beardsley could only make payment so as to bind the association by giving the money to the secretary, and that because the treasurer was the one to have custody of the mortgage he was the only person authorized to execute a certificate of cancellation thereof.

It is undoubtedly true that members of building and loan associations are bound by the by-laws thereof, and may not bind the association by payments not made in accordance therewith, unless such irregular payments, or payments to persons not authorized, are ratified or confirmed by the association, or unless the association, by its conduct, has estopped itself to deny the righteousness of the conduct of the shareholder. Citation of authorities of this principle is unnecessary.

Another equally well-settled principle is that a president or other officer of a corporation may not bind the same unless he be authorized, but his action will frequently bind the association, if, by its conduct, it has estopped itself to deny the right of the person dealing with the president to consider him authorized.

The sole question in the case before us, in view of the well-settled principles applicable thereto, is whether, under the circumstances of this particular case, the association is to be bound by the payment and by the action of the president with respect to the cancellation of the mortgage.

I am of opinion that the association is bound.

The money which was paid was not dues, and was not paid by a member on account of dues, but was paid to satisfy a debt due the association. Of course, such payment must be made to someone who is either specifically or impliedly authorized to receive it. As all of Beardsley's dealings with the association were had through Belcher, as he received the money from Belcher when he gave the bond and mortgage, and received from Belcher the word as to when he should attend to pay the same off, and, upon going to the Paterson office of the association,

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found Belcher there with the bond and mortgage, I think the only proper conclusion is that he was justified in believing that Belcher was authorized by the association to receive the debt due upon that bond and mortgage. And to the extent that Baker's rights are involved, certainly he was justified in assuming that this bond and mortgage were being properly paid off when the money therefor was paid to the president of the association who had physical possession of the bond and mortgage.

Although it is argued by the complainant that the president was not the proper person to execute or sign the informal certificate of cancellation, there is nothing to support this contention. I know of no law which, of itself, designates what officer of a corporation is the proper one to make such an informal certificate. While it may be true that the treasurer is the indicated person to sign a receipt for money received by the company, or, perhaps, in cases where the secretary is the proper person to receive the money as in this case, he should be held to be the indicated person to sign a receipt; the writing in question is not a receipt, it is an endorsement upon a mortgage certifying that it has been paid and satisfied, and directing or authorizing its cancellation. Such a writing, it seems to me, in the absence of any specific law or by-law upon the subject, should more properly be made by the president than by any other officer, since his are general powers, and this is a writing in the name of the corporation of a general nature.

Therefore I find that the defendants Beardsley and Baker were justified in assuming that Belcher as president not only was authorized, as I have previously found, to receive the money, but also to make the certificate of cancellation upon the mortgage which he did make.

There is ample testimony to show that this association entrusted large powers to Belcher and carried on a large part of its business through him, having its Paterson office, as just stated, in his private office, where it kept its safe in which its securities were contained. While it is true that the treasurer testifies that he had the Beardsley bond and mortgage at one time and put them in the safe and kept the key of the portion of the safe in which these papers were contained, it also appears that numerous

other mortgages were paid off to Belcher, and I think it clear that he did have physical possession of them for that purpose. The treasurer swears that he did not give this bond and mortgage to Belcher, but there is no explanation as to how Belcher got them, and if the treasurer's testimony is true Belcher could not have obtained them. The very fact that he had them shows that he did have access to the securities of the association, or that the treasurer did give them to him. In any event, as against the innocent persons whose moneys were paid in good faith on account of this bond and mortgage, I think it proper to hold, under the proven facts, that the carelessness or negligence of the association and its officers was the proximate cause of the loss. Under such circumstances the authorities are clear that the association should be the one to bear the loss.

Furthermore, there is proof that during the ten years of Belcher's presidency eighty-four mortgages were canceled in the clerk's office of Passaic county, of which twenty-eight bore substantially similar endorsements to the one in question; three thereof were canceled on a certificate signed by Allee, the secretary; one on the signatures of Belcher as president and Allee as secretary; ten on the signatures of Belcher as president and Roe as treasurer; thirty-nine on the signature of Roe as treasurer, and three certificates of discharge signed by the president and secretary under the seal of the association. It thus appears, not only from the oral testimony, but from the records of the county, that Belcher constantly exercised this power, and that he must have exercised it to the knowledge and with the consent of the association.

Under all the circumstances, therefore, I conclude that this mortgage was properly canceled.

The only other matter relied upon by the complainant is that since the mortgage was recorded in full, and not merely registered in abstract, it cannot be properly discharged excepting by a certificate of discharge duly acknowledged or proved and recorded. The argument is that *2 Gen. Stat. 2107 § 23* provides that when a mortgage is registered, and shall be redeemed and paid, it shall be the duty of the clerk, on application of the mortgagor or person paying the same and producing to him said

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mortgage canceled, or a receipt thereon, signed by the mortgagee, &c., to enter, in a margin to be left for that purpose, a minute of said redemption, payment and discharge, which minute shall be a full and absolute bar to and discharge of the said entry, registry and mortgage, while section 25 provides that any mortgage that has been recorded or registered shall be discharged upon presentation of a certificate signed by the mortgagee, his heirs, &c., acknowledged or proved, and certified in the manner prescribed, &c., and that every such certificate shall be recorded and a reference made, &c. Therefore the complainant claims that unless the certificate of discharge is acknowledged and recorded as provided by the twenty-fifth section, the alleged discharge is not effective. By going back to the revision of 1846 (*Nix. Dig. 550*) it will be found that in sections 1 and 5 of the act to register mortgages the words "record" or "recording" are used synonymously with the words "register" or "registering." Since the registry of a mortgage has a limited use for the purposes of evidence, there was in 1858 (*P. L. 1858 p. 90*) enacted a supplement to the act to register mortgages, providing for their being registered or recorded in full, and such record then became receivable in evidence as copies of deeds are. In 1869 the act was passed which is now section 25 of the general statutes (*Gen. Stat. p. 2107*), providing for another and fuller discharge of mortgages by the instrument therein provided for. I am of opinion that this is not an exclusive method, and that the other statutory method as contained in section 23 of the same act (*Gen. Stat. p. 2107*) is equally effective.

The result is that the bill must be dismissed, with costs.

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PASQUALE MAZZOLLA

v.

EDWIN WILKIE et al.

[Decided March 19th, 1907.]

1. An agent of an insurance company collected insurance money under a power of attorney from the beneficiary and deposited it with a third person, who refused to deliver it to the beneficiary unless the beneficiary would give him one-half thereof to pay to the agent pursuant to an alleged agreement between the beneficiary and the agent.—*Held*, that the beneficiary could bring an equitable action against the agent and the third person to impress the money in the third person's hands with a trust in favor of the beneficiary, and after adjustment to compel the payment of the money to the complainant.

2. The court of chancery possesses a general jurisdiction in cases of fraud, as well where there is a plain, adequate and complete remedy at law, as in other cases.

On demurrer to bill.

Messrs. McCarty & McMahon, for the complainant.

Messrs. Melosh & Morten, for the demurrant Edwin Wilkie.

GARRISON, V. C.

This is a demurrer to a bill. From facts charged in the bill the following sufficiently appears:

The complainant was the beneficiary named in life insurance policies upon the life of his wife to amounts aggregating \$4,000, payable to him at her death. The same accident which caused her death, namely, the leakage into their sleeping apartment of illuminating gas, seriously affected him, so that he was taken to a hospital for treatment. While in the hospital, Wilkie, the agent who had effected the insurance, prevailed upon the complainant to give to him a power of attorney to collect the insurance money. He effected this by assuring the complainant that

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he was the only one who could collect the money. The complainant is an Italian who speaks and understands the English language with great difficulty. Subsequently, upon representations by Wilkie that the first power of attorney was insufficient, the complainant made a second power of attorney to Wilkie, in which the following words were "fraudulently" inserted:

"To pay all necessary and lawful expenses for the proper release and collection of each of said policies, and, after paying all necessary and legal expenses thereon or arising thereunder, to retain to himself for his services, the amount hereto agreed between us for that purpose and to pay me the balance in his hands as soon as the same is received by him from the said companies."

It is charged that the complainant never made any agreement with said Wilkie to pay him any sum for his services.

Subsequently the money was collected by Wilkie, and upon the complainant applying to him for the same Wilkie informed the complainant that he had deposited the money in the hands of his lawyer, Henry J. Melosh, of Jersey City. The complainant thereupon applied to Melosh, who refused to pay him the money, or any part thereof, unless complainant would give to him one-half thereof to pay to Wilkie pursuant to an agreement which Melosh stated the complainant had made with Wilkie. There is then a charge that the agreement as alleged was procured by fraud from the complainant, and that false representations were made by Wilkie.

The prayer is that the money in the hands of Melosh may be decreed to be held in trust for the complainant, and that Melosh or Wilkie may be decreed to pay the complainant, and that the alleged agreement may be decreed null and void, and that in the meantime Melosh and Wilkie be restrained and enjoined from paying out or disposing of the said money.

It is difficult, because of the phraseology of the bill and its construction, to determine whether the pleader intends to charge that the power of attorney was procured by fraud and misrepresentation, or that the agreement referred to in the power of attorney was so procured, or that the clause inserted in the power of attorney was the fraudulent matter complained of. If the bill were attacked by notice under the rules, I am inclined to

think that it would be entirely proper to require the complainant to more clearly state, for the defendant's benefit, the matters complained of, but in the face of a general demurrer the bill must be sustained, if it is possible, from the charges contained in it, to spell out an equity in favor of the complainant.

The demurrer is filed by Edwin Wilkie, one of the defendants, and attacks the bill upon two grounds—*first*, because the bill is without equity, and *second*, because there is a complete and adequate remedy at law.

I do not think that the bill is without equity. The complainant alleges—leaving out, for the present, all charges of fraud—that his agent, under a power of attorney specifying, among other things, that he was to collect the money, and after making certain deductions therefrom was to pay it over to the complainant, had collected the money and, instead of paying it over, had deposited it with a third person. The suit is against the agent and such third person to impress the money in the hands of the third person with the trust, and, after adjustment, to compel the payment of the money to the complainant. Under these circumstances I do not see how the complainant could bring an action at law successfully. If he sued the agent and the depository together he would fail, because he has no cause of action against them jointly, or any cause of action which could be litigated in a suit at law to which they were both parties.

If he sued the agent separately he could, of course, recover a judgment, but it would be without effect upon this particular property, which is not in the agent's possession, and one situated as this complainant is surely is not required to forego his remedy against money earmarked as this is.

If he proceeded at law against the depository alone he would fail, because the depository would only be required to pay it over to him after the rights of the agent in the money were settled.

A court of equity is the only tribunal, under our system, which can settle and adjust the various rights of these parties.

The principle involved is illustrated and enforced in the case of *Leonard v. Camden National Bank*, 70 N. J. Law (41 Vr.) 660 (*Court of Errors and Appeals*, 1904). As is there said, the sole obligation of the depository is to hold the fund until the

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rights of the claimants are settled between themselves, and then to surrender the fund to the rightful claimant.

In the situation disclosed by the bill under consideration the only obligation which Melosh seems to have undertaken is to hold the money until the rights of Wilkie and the complainant are settled with respect thereto. Under such circumstances equity has jurisdiction.

This, of course, leads to an overruling of the demurrer.

Because of the conclusion just reached and stated I do not think it necessary to consider or determine whether, by reason of the charges of fraud, this is one of those cases in which equity will retain jurisdiction, notwithstanding that there is a plain, adequate and complete remedy at common law. The court of chancery in this state possesses a general jurisdiction in cases of fraud, as well where there is a plain, adequate and complete remedy at law as in other cases. *Eggers v. Anderson*, 63 N. J. Eq. (18 Dick.) 264 (Court of Errors and Appeals, 1901); *Dawson v. Leschziner*, 65 Atl. Rep. 449 (Chancellor Magie, 1907).

I will advise a decree that the demurrer be overruled, with costs.

THE PATERSON GENERAL HOSPITAL ASSOCIATION

v.

JACOB H. BLAUVELT, executor, &c., et al.

[Decided April 6th, 1907.]

1. Where a testator follows bequests of pecuniary legacies with a general residuary clause, the legacies are charged upon the entire residuary estate, real and personal, and remain so charged until paid, the lien upon the realty being not contingent upon the insufficiency of the personalty at the testator's death or at the final accounting, and it being immaterial that the legacies fail of payment out of the personalty because it has been wasted, embezzled, misappropriated or destroyed.

2. A legatee was not barred by laches in 1906 from suing to enforce its lien upon the residuary realty, where testatrix died May 6th, 1892, and

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January 5th, 1899, the legatee obtained a decree requiring the executor to pay the legacy and he refused to pay it on the ground he had no assets in his possession.

3. A presumption of the payment of a legacy does not arise until after twenty years from the accrual of the right to it.

Heard on demurrer to bill.

Hannah Grundy died on the 6th day of May, 1892. By her will, which was duly probated in the orphans court of Passaic county, she bequeathed general pecuniary legacies aggregating \$12,400, and then gave, devised and bequeathed all the rest, residue and remainder of her estate, real and personal, where-soever situate, or of whatsoever the same might consist, to her cousin, John Clough, and appointed Jacob H. Blauvelt sole executor.

Among those to whom pecuniary legacies were bequeathed was the complainant, whose legacy was \$4,000.

The will was admitted to probate, and letters testamentary were issued to Blauvelt, the executor.

The testatrix died possessed of personal property and real estate, the inventory of the personal property amounting to \$15,414.35. On the 31st day of December, 1896, the executor, by his final account duly allowed by the orphans court of Passaic county, showed that he had paid all of the legacies bequeathed in the said will except the sum of \$1,850 to the complainant, \$360 to another legatee and \$100 to another, and the said account also showed that the executor had a balance in his hands of the personal estate amounting to \$2,638.51.

After this time the executor made a payment to the complainant of \$200, leaving a balance still due to it of \$1,650.

On the 19th of December, 1898, the complainant began proceedings in the orphans court aforesaid against the executor which resulted, on the 5th of January, 1899, in a decree that the executor pay to the complainant, upon its tendering a proper refunding bond, the sum above mentioned remaining due upon its legacy, whereupon it tendered a proper refunding bond, and the said executor refused to pay, stating that he had no assets of the estate in his possession.

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The bill charges that the executor, at the time of filing the final account on the 31st day of December, 1896, had wasted the estate of Hannah Grundy, and had misappropriated the same; that he was and is now insolvent and of no financial responsibility whatever, and that the complainant has exhausted all means at its command to obtain the balance due upon its legacy.

The bill also charges that at various dates from the 15th of June, 1895, to the 29th of June, 1906, the residuary legatee, John Clough, conveyed certain portions of the real estate, and agreed to convey certain other portions thereof to various persons.

The bill charges that the legacy of the complainant is a charge upon the real estate of the decedent, and prays that the same may be so decreed, and that the defendants be decreed to pay the amount due thereon, or that so much of the real estate as may be necessary may be sold to raise and pay the same.

The executor, the residuary devisee, and each of the parties to whom real estate was conveyed by the residuary devisee, and the other legatees who have not received payment in full, are made defendants.

John Clough, the residuary devisee, files the demurrer. His grounds may be briefly summarized as follows:

First. That the complainant is in laches in attempting, at this late date, to charge the real estate of the defendant acquired as residuary devisee.

Second. That there was sufficient personal estate at the time of the death of the testatrix to pay all of the legacies, together with the costs of administration, hence there is no charge upon the real estate acquired by the defendant under the will.

Third. That, under the will, there was no intention to charge the real estate acquired by the demurrant under the residuary clause thereof.

Fourth. That if the complainant ever had a lien, its delay in enforcing the same has resulted in its losing it.

Fifth. That the complainant has not, on the face of its bill, justified its laches.

Mr. Robert Williams and *Mr. Gustav A. Hunziker*, for the complainant.

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Mr. George P. Rust and Mr. Thomas P. Costello, for John Clough, demurrant.

GARRISON, V. C. (after stating facts).

There is no doubt that where a testator bequeaths pecuniary legacies and follows this with a general residuary clause, the legacies are charged upon the entire residuary estate, real as well as personal. This matter was set at rest in this state by the decision of the court of errors and appeals in the case of *Corwine v. Corwine*, 24 N. J. Eq. (9 C. E. Gr.) 579 (1874). The rule as there stated was adopted from *Hawk. Wills*, and is in the following language (at p. 294) :

"It has been said that a testator generally intends the legacies given by his will to be a charge on his residuary real estate, as well as on his personal estate, but (in the absence of an express charge) they are held to be so only when the residuary real and personal * * * estate are given together * * * it being a rule of construction that if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real, as well as the personal, estate."

In the case of *Johnson v. Poulson*, 32 N. J. Eq. (5 Stew.) 390 (*Court of Errors and Appeals*, 1880), the rule in *Corwine v. Corwine*, *supra*, is explained, and is shown to apply only to those cases in which there is no evidence of contrary intention appearing in the will. That is to say, a will giving legacies generally, and following that with a residuary clause blending all of the property, real and personal, therein, will be construed as charging the legacies on the blended mass of real and personal property left by the testator. But if there is anything in the will which shows a contrary intent, then the charge does not necessarily result from a residuary clause of the character mentioned.

In the case at bar there is nothing in the will to take it out of the plain rule laid down in *Corwine v. Corwine*, *supra*, and so frequently applied since that time. *Brown v. Brown*, 31 N. J. Eq. (4 Stew.) 422 (*Chancellor Runyon*, 1879) ; *Miller v. Sandford*, 31 N. J. Eq. (4 Stew.) 427 (*Chancellor Runyon*, 1879) ; *Adams v. Beideman*, 33 N. J. Eq. (6 Stew.) 77 (*Chancellor Runyon*, 1880) ; *Cook v. Lanning*, 40 N. J. Eq. (13 Stew.) 369

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(*Chancellor Runyon*, 1885); *Langstroth v. Golding*, 41 N. J. Eq. (14 Stew.) 49 (*Chancellor Runyon*, 1886); *American Dramatic Fund Association v. Lett*, 42 N. J. Eq. (15 Stew.) 43 (*Chancellor Runyon*, 1886); *Turner v. Gibb*, 48 N. J. Eq. (3 Dick.) 526 (*Vice-Chancellor Green*, 1891); *Congregational Church v. Benedict*, 59 N. J. Eq. (14 Dick.) 136 (*Vice-Chancellor Stevens*, 1899); *affirmed*, 62 N. J. Eq. (17 Dick.) 812; *Horton v. Howell*, 56 Atl. Rep. 702 (*Vice-Chancellor Stevens*, 1903).

Since it is the rule that the personal estate of a decedent is the primary fund for the payment of debts and legacies, the question arises, in applying the doctrine of *Corwine v. Corwine*, *supra*, whether there is any charge upon the residuary real estate if there is sufficient personal property to pay the debts and legacies. There is no doubt whatever that, as between the residuary devisee and a legatee, the legatee can be compelled by the devisee to proceed to obtain his legacy from the personal estate before resorting to the real estate. The question, however, still remains whether, if the legatee does proceed to obtain payment first from the personal estate and fails, although there was at the time of the death of the testator or of the final accounting ample personal estate to pay debts and legacies, the lien upon the real estate exists, or whether such lien only arises in the event that there was not sufficient personal property applicable to the payment of legacies.

Concisely stated, I think the question is whether, under the doctrine being considered, the proper holding is that there is a lien or charge upon the residuary real estate, or that there is such a lien or charge only if there is not sufficient personal estate at the time of the death of the testator or final accounting to pay the legacies.

It seems to me plain that if the first suggestion is adopted as a correct statement of the rule, then the lien or charge must remain until paid, and it is utterly immaterial whether there was sufficient personal property at the time of the death of the testator or of the final accounting, the only importance of that question being that such personal property must be resorted to by the legatee before enforcing his charge upon the real estate.

On the other hand, if the latter statement of the rule is the correct one, then if there was sufficient personal property at the death or at the final accounting, there is no charge. This proceeds upon the reasoning that the testator only intended to charge his real estate if he had not sufficient personal property to pay the legacies.

I am of opinion that, under the reasoning and precedents, a will of the kind here under consideration charges the legacies upon the land, and that they remain a charge until paid. I do not think that the proper rule is that the so-called charge or lien is a contingent one which only arises in the event that there was insufficient personal property at the time of the testator's death or at the final accounting. The leading case upon this subject is *Greville v. Browne*, 7 H. L. Cas. 690 (1859). In that case there was a pecuniary legacy, a general residuary clause, and another person than the residuary devisee was the executor. Lord-Chancellor Campbell (at p. 696) said: "For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given is given *minus* what has been before given, and therefore given subject to the prior gift." He further quotes with approval the language of Vice-Chancellor Page-Wood, who said: "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge, the principle of the decision being in truth the same in the case of legacies as in that of debts."

Lord Cranworth (at p. 699) said: "The distinction that is suggested between real and personal property is an artificial part of the case," and Lord Kingsdown (at p. 705), after holding that "the rest" must be construed to mean "that which remains after what has previously been given is withdrawn," proceeds to say: "The distinction which is relied upon * * * is, I think, a distinction which is founded, not upon general principles, or upon the ordinary sense of mankind, but entirely upon the technical rules of the English law."

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It must be recalled that by reason of the feudal system and the inability to transfer lands by will there grew up an entirely arbitrary distinction with respect to property. As has just been pointed out by the judges above quoted, there is no real distinction in the mind of the layman between one kind of his property and another kind. He has property. He desires to dispose of it by will. To the lay mind it does not occur that any distinction will be applied, and hence, when he gives some of the property in the form of money bequests, and what is left of his property in a mass to another, he undoubtedly means that all of his property shall first be used (after payment of his debts) to pay the legacies he has given, and that only what is left shall go to the one who is to have the residuum.

It is an entirely artificial thing that the personal property is held to be the primary fund for the payment of debts and legacies, and while it is perfectly true that it is so held, I think it entirely improper to extend this doctrine so as to hold that if, for any reason, the personal property is diverted from and does not reach the legatee, he thereby loses his legacy in a case where the testator left ample property to pay the named pecuniary legacies.

It will be observed that in the leading case just cited there is no suggestion that the charge upon the realty arises in the event of a deficiency of personal property. The court, as has been demonstrated, wiped out any distinction in such cases between the two classes of property, and held squarely and without qualification that the legacies were a charge upon the realty. This case was cited in our leading case of *Corwine v. Corwine*, *supra*, and (at p. 584 thereof) is shown to be the basis of the modern formulation of the doctrine.

The difficulty which now confronts us has arisen, in my view, because the courts, in stating the undoubted rule that the personal property is the primary fund for the payment of legacies, have failed to clearly show that this relates merely to priority or precedence in the marshaling of assets, and does not affect the existence or continuance of the lien. Because the residuary devisee has the undoubted right to have the personal property of the decedent, after the payment of his debts and administration

expenses applied to the satisfaction of pecuniary legacies, the courts have often unqualifiedly stated that, under the doctrine being dealt with, the legacies are a charge on the land if there be an insufficiency of personal estate. This is undoubtedly the rule, but it is not the whole rule, and as thus stated leads to the incorrect inference to which I have alluded. If from this statement of the principle it is inferred that there is only a charge upon the real estate in the event of there being an insufficiency of personal estate, then such inference is unwarranted and the principle is not properly applied.

In my view, as between the legatee and "the estate," the latter is charged as a whole, irrespective of any distinction as to different kinds of property, and remains charged until the legacy is paid. In the matter of marshaling of assets, or of determining the rights as between the residuary devisee and the legatee, the latter undoubtedly can be compelled to exhaust his remedy against the personal property before enforcing the lien which he has upon the real estate. Many of the cases above cited as following *Corwine v. Corwine*, *supra*, refer in the way in which I have above indicated to the necessity of there being an insufficiency of personal assets before the doctrine contended for will be applied. But *Greville v. Browne*, *supra*, the leading authority above cited, does not, as heretofore shown, refer to the necessity of any such insufficiency to create the lien, and the following cases in our own courts have stated the doctrine without any such qualification: *American Dramatic Fund Association v. Lett*, *supra* (at p. 44); *Stevens v. Flower*, 46 N. J. Eq. (1 Dick.) 340 (*Chancellor McGill*, 1890); *First Baptist Church v. Syms*, 51 N. J. Eq. (6 Dick.) 363 (*Chancellor McGill*, 1893); *Carter v. Gray*, 58 N. J. Eq. (13 Dick.) 411 (*Vice-Chancellor Grey*, 1899); *Vernon v. Mabbett*, 58 Atl. Rep. 298 (*Vice-Chancellor Grey*, 1904); *Haberman v. Kaufer*, 61 Atl. Rep. 976 (*Vice-Chancellor Grey*, 1905); see, also, *Wyckoff v. Wyckoff*, 48 N. J. Eq. (3 Dick.) 113 (*Vice-Chancellor Pitney*, 1881). While the vice-chancellor in that case dealt only with the doctrine which concerned land devised to a person who is directed to pay a legacy, and held that in such case the deficiency of personal assets was not considered, he cites authorities which show that the same

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ruling is made in cases where the charge is upon a residuary estate, and is not confined to cases where the land is devised with a specific direction to pay. In *Greville v. Browne*, *supra*, one of the authorities cited by the vice-chancellor, and which I have heretofore alluded to, Lord Cranworth, in commenting upon an argument and an inference from the case of *Awbrey v. Middleton*, points out that the circumstance that the legacies were directed to be paid by the executor, and that the gift of the general residue was to the executor, did not control the decision, but that the decision proceeded upon the general principle that the residue was charged with the legacy, and therefore the legacy must be paid without regard to whether it came from personal property or real estate.

If, then, I am correct in my understanding of the principle, this will, as above stated, created a lien or charge upon the real estate, and the authorities all hold that under such circumstances nothing but payment to the legatee extinguishes the lien. *Quick v. Quick*, 1 N. J. Eq. (Sax.) 4 (*Chancellor Vroom*, 1830); *Terrhune v. Colton*, 10 N. J. Eq. (2 Stock.) 21 (*Chancellor Williamson*, 1834); *Grode v. Van Valen*, 25 N. J. Eq. (10 C. E. Gr.) (at p. 97) (*Chancellor Runyon*, 1874). See, also, collection of cases in other jurisdictions. 49 Am. Dig. col. 3254 § 2122.

Even in cases where the charge was upon the real estate, "if the personal property should prove insufficient to pay," the Irish courts have held that the lien existed in cases where the executor embezzled sufficient personal property to have paid the legacies. Although in the English court of chancery, under similar circumstances, there is a different holding. *In re Massy*, 14 Ir. Ch. 355 (1863); *McCarthy v. McCartie*, 1 Ir. Rep. 86 (1897); *Richardson v. Morton*, L. R. 13 Eq. 123 (1871).

In the case of *Sims v. Sims*, 10 N. J. Eq. (2 Stock.) 158 (at p. 161) (*Chancellor Williamson*, 1854), there is a *dictum* that if the executor embezzles the money of the estate the legatee loses, and the land is released. It will be found in analyzing that case—*first*, that the chancellor held that under the will therein considered there was no charge upon the real estate, so that what he had to say concerning the effect of the embezzlement of the executor in a case where there was a charge was *dictum*, and

secondly, that the authorities which he cites for that *dictum* are those in which land charged with the payment of legacies was once resorted to and the money raised upon it and paid to the executor for the legatee, and the misconduct or embezzlement of the executor was then attributable to the legatee, and not to the devisee, whose land had once suffered the burden. Undoubtedly the cases hold that if there is a charge, and the amount of the charge is obtained from the land, that land shall not again be subjected to the same charge. But I do not think that this in any way militates against the principle that if the land is subject to the charge and has not borne it, it is not exempt therefrom because the executor did have funds in his hands arising from the personal estate which should have been devoted to paying the legacy.

In the case at bar there was sufficient personal property left by the testatrix, if properly and honestly administered upon, to have paid the legacies in question. This money was wasted, misappropriated or embezzled by the executor. The legatee (the complainant) has pursued the executor, and has, it pleads, exhausted all the remedies at its command to obtain payment of its legacy, and has failed to secure such payment, and cannot secure it because the executor is insolvent and there is no personal property of the decedent now in existence to be applied to this legacy.

In the case of *Horton v. Howell*, 56 Atl. Rep. 702 (1903), Vice-Chancellor Stevens holds that, as between the residuary devisee and the legatee, the net amount shown to be in the hands of the executor from his administration of the personal property is all that the devisee can require as applicable to the legacy. In the course of his reasoning it will be found that he holds that the intention of the testator must be held to be to prefer the legatee as against the residuary devisee, and he points out that extraordinary expenses of litigation carried on by the executor are not chargeable as against the legatee in relief of the land devised to the residuary devisee, because the testator could not contemplate that any such expenses should reduce the amount payable to the legatee upon his legacy. By parity of reasoning I think it may fairly be said in the case in hand that the testatrix

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could not contemplate that an embezzlement of her personal property by her executor should result in a loss to the legatee while there was property, whether real or personal, coming to the residuary devisee. In my view, the whole matter is settled by the holding (which I find to be the correct one) that, under the language of this will, the legacies were charged upon the property of the testatrix, and that until they are paid they remain a charge, and therefore it is immaterial whether they fail of payment out of the personal property because it was wasted, embezzled, misappropriated, or destroyed by an act of God. If we suppose a case in which ample personal property in the shape of money was left in a bank which failed, or was left in some form which was destructible, and that it was, without negligence or fault, and by an act of God, destroyed, we are then to consider whether the testator intended that the legatee should lose and the residuary devisee should be exempt from loss under such circumstances. I fail to see how it can be reasonable to hold that the testator had any such intention. He names his beneficiaries and the amounts he desires them to receive, and the rest of his property, without artificial distinction between the kinds, he leaves to another. I think the only reasonable conclusion is that those to whom he has given pecuniary legacies have a charge upon all the property, and that until they are paid such charge remains.

This decision disposes also of the contention of the defendant that there was laches. It would be equally ineffectual, in my view, if the objection came from those who acquired title from the residuary devisee. *Grode v. Van Valen, supra*. But undoubtedly, on behalf of the residuary devisee himself (who is the only demurrant here), there is no basis for a contention that the complainant is barred by laches from enforcing its lien upon the residuary realty. A presumption of payment of a legacy does not arise until after the expiration of twenty years from the time of accrual of the right to it. *Coleman's Executors v. Howell*, 16 Atl. Rep. 202 (*Vice-Chancellor Bird*, 1888); *Congregational Church v. Benedict, supra* (at p. 140).

I will advise a decree overruling the demurrer, with costs.

Fogg v. Ocean City Sewer Co.72 Eq.

ALBERT FOGG

v.

OCEAN CITY SEWER COMPANY.

[Decided April 11th, 1907.]

1. The official record of the contents of an ordinance may not be varied by parol.

2. A paper, entitled "Application for Sewer Attachment," executed by a property owner and a sewer company, providing that the company agrees to allow the owner to make attachment of his property to the main sewer pipe, sewer to be used at named rates per year, and that the owner makes application for sewer attachment as above, and agrees to comply with all the company's present and future rules relative to the use of sewer, is a license to connect, and an arrangement from year to year only, so that the company, on giving due notice, can charge a higher rate for subsequent years, up to the limit allowed by ordinance.

Heard on bill, answer, replication and proofs.

Messrs. Bourgeois & Sooy, for the complainant.

Messrs. Thompson & Cole, for the defendant.

GARRISON, V. C.

Ocean City, in the year 1893, was a borough, having been incorporated under the Seaside Borough act. 1 *Gen. Stat. p. 254*. On the 28th day of April, 1893, the council of the said borough passed an ordinance over the veto of its mayor dealing with the Ocean City Sewer Company. The original ordinance as laid before the mayor, acted upon by him and returned to council, is lost. The complainant introduced into evidence the ordinance book of the said borough. The clerk is, by the statute in question, required to keep such a book, in which he is to record the ordinances as passed. From this exhibit it appears that the borough, by the ordinance in question, granted certain

2 Buch.

Fogg v. Ocean City Sewer Co.

powers and privileges in the streets to the said sewer company, and in the eighth paragraph thereof provided as follows:

"That the said company charge and collect in advance, for the use of said sewer service, as follows: For hotels or boarding-houses, seventy-five (75) cents per annum for each sleeping-room, not exceeding thirty, and fifty (50) cents per annum for each additional sleeping-room over said number; private dwellings or cottages, seventy-five (75) cents per annum for each room, not exceeding ten, and fifty (50) cents per annum for each additional room over said number."

Under the Borough act aforesaid it was necessary, before the ordinance became effective, that it be published for two weeks, and such publication was duly made, and copy thereof was introduced into evidence, and is an exact copy of the ordinance as it appears in the ordinance book.

The complainant in 1893 was the owner of certain houses in the borough of Ocean City. In 1895 a writing was executed between the complainant, through the plumbers with whom he had contracted to do the plumbing in his houses as his agents, and the sewer company, which, in its material parts, is as follows:

"APPLICATION FOR SEWER ATTACHMENT.

"OCEAN CITY SEWER CO.

"OCEAN CITY, N. J., June 15th, 1895.

"The Ocean City Sewer Company hereby agrees to allow Smith & Thorn to make attachment to the main sewer pipe * * * Owner of property, Albert Fogg. * * * Full number of sleeping-rooms, 4 rooms in each cottage, 5 cottages, 20 rooms in all. Sewer to be used at the following rates per annum:

All sleeping-rooms of 30 or under, in hotels or boarding-houses.	\$.75 each
All sleeping-rooms over 30.....	\$.50 "
All sleeping rooms of 10 or under, in private dwellings.....	\$.75 "
All sleeping-rooms over 10, in private dwellings.....	\$.50 "

"I do hereby make application for a sewer attachment as above, and do grant permission to enter premises for all purposes relating to said sewerage, and do agree to conform to and comply with all laws, resolutions, rules and regulations which have been or may at any time hereafter be enacted relative to the use of sewerage.

"(Signed)

ALBERT FOGG.
"H. C. SMITH."

By the ninth section of the ordinance it was provided that if the company did not change the outlet of its sewers before the expiration of ten years from the passage of the ordinance it must reduce the schedule of rates as provided in paragraph 8 twenty per cent. The ten years' period expired in 1903. The company did not change the outlet of its sewers. In 1903, therefore, the company was not empowered, under the ordinance, to charge more than the schedule in paragraph 8, less twenty per cent.

Beginning in 1903 the company rendered bills to the complainant for his sewer connections for the private houses or cottages owned by him upon the basis of the number of rooms contained in each cottage. Up to that time and during the ten years' period from the passage of the ordinance its bills had always been based upon the number of sleeping-rooms in each of such private houses or cottages.

It is the contention of the complainant that the company has no right in the premises to charge him for each house any more than seventy-five cents per sleeping-room, less twenty per cent. The complainant seeks to justify this position by the contention that the original ordinance considered by council, vetoed by the mayor and passed over the latter's veto, contained the word "sleeping" before the word "room" or "rooms" in the paragraph relating to the rates to be charged for private dwellings or cottages. He argues that since the paper upon which the original ordinance was printed or written has been lost, he has the right to introduce evidence of a secondary nature as to the contents thereof, and he called two of the members of the borough council, who were members at the time that the ordinance was passed over the mayor's veto on the 28th of April, 1893, to endeavor to prove that the word "sleeping" was in the original paper.

At that time the council consisted of five members.

Before the complainant can prevail it must be first settled in his favor as a matter of law that the official record of the contents of an enactment may be varied by parol evidence. It is conclusively settled in this state that it may not. *Bloomfield v. Board of Chosen Freeholders of Middlesex County*, 74 N. J. Law (45 Vr.) 261 (Supreme Court, 1907), and cases there cited.

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Even were the law otherwise, I do not think that the complainant in this case has proven the fact for which he contends.

This leaves for consideration the question as to whether or not the written paper, dated June 15th, 1895, is a contract between the complainant and defendant of such a nature and kind, and of such duration that the defendant, under it, is bound to continue to furnish service at the rate of seventy-five cents per sleeping-room for each of the houses of the complainant in said paper mentioned.

I think the effect of that paper-writing and the conduct of the parties was to license the complainant to connect with the sewage system of the defendant at the prices therein mentioned. *Fogg v. Ocean City*, 74 N. J. L. (45 Vr.) 362 (Supreme Court, 1907). That there was not constituted thereby a continuing contract of perpetual duration; that in effect the arrangement between the parties was from year to year. Under the ordinance the rates were to be paid in advance. The complainant was not bound to connect, or to continue a connection once made. If he chose to act upon the license he could do so, and then became bound to pay the rates specified in the paper. He could discontinue the connection without subjecting himself to any claim for damages on the part of the defendant.

The defendant, on its part, was bound to furnish the service at the rates specified for any year it served the complainant until it gave due notice of a change of rates for an ensuing year. It had the right, up to the limit authorized by the ordinance, to change the rates. It was not bound by a definite binding contract perpetually to serve at the rates mentioned in the paper-writing.

Since the complainant fails to prove that the charges were unauthorized, he fails to make out a case, and his bill must be dismissed, with costs.

Tuite v. Tuite.

72 Eq.

PETER J. TUITE et al.

v.

MARY J. TUITE.

[Decided April 11th, 1907.]

1. Evidence *held* insufficient to justify a finding that defendant purchased certain real estate in her own name under an agreement to hold the same in trust for herself and complainants, her minor children.

2. Defendant, on the death of her husband, continued his junk business, with the assistance of three of her six minor children, the eldest of whom was a girl of sixteen and the youngest only a month old. She collected all the money, paid all the bills, and employed such help as was necessary, and from the profits purchased certain real estate in controversy.—*Held*, insufficient to establish a partnership between defendant and her children, under which they were entitled to an equal share in the profits, while defendant was alone responsible for losses.

3. The mother being entitled to the earnings of the children during minority, there was no consideration for such an agreement of partnership, if one was made.

4. Where, after the death of defendant's husband, she assumed control of his estate without any administration being declared thereon, she was chargeable with the value of the property derived from her husband, less all payments made by her with which a lawful administrator might have been credited, under the express provisions of 2 *Gen. Stat.* p. 1426 § 3.

Heard on bill, answer, replication and proofs.

This is a bill filed by Delia, Peter, Ellen and Ann Tuite against Mary J. Tuite. Mary J. Tuite is the mother of the four complainants. The father was Michael J. Tuite. He died on the 9th of February, 1885, intestate, leaving at that time the widow aforesaid and six children, one of whom, Sarah, at the time of her father's death was fourteen years of age, died on the 22d of January, 1888, and another of whom, Michael, was born in January of 1885 and died in December of the same year.

The bill charges that at the time of the death of Michael J. Tuite he was engaged in the junk business in Jersey City, which

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at that time was worth about \$3,000; that no letters of administration were taken out, but Delia, the eldest child, and Peter, the next eldest, took charge of the business, and, with the assistance of Sarah until her death, conducted the same; that the business was profitable, and the income therefrom was invested in real estate in Hudson county, with the understanding and agreement that such real estate should be the joint property of the complainants and the widow, Mary J. Tuite, but that for the purpose of convenience the title to all of such property should be and was taken in the name of Mary J. Tuite, she to collect the rents and income, and, after paying the taxes and other expenses, to divide the balance among the complainants and herself in equal proportions.

It is charged that Mary J. Tuite agreed to hold the property in trust for the complainants and herself in equal shares, and it is prayed that she be decreed to be trustee, and that each of the complainants is entitled to a one-fifth part of the real estate and to a one-fifth part of all the rents, issues and profits thereof, less the expenses and disbursements in connection therewith.

The answer denies any agreement or arrangement concerning the said property, and denies that the defendant is a trustee for the complainants, and avers that all the property now standing in the name of Mary J. Tuite is her own, unqualifiedly, and that the complainants have no interest or estate whatsoever therein.

Mr. James P. Northrop and Messrs. Tumulty & Cutley, for the complainants.

Messrs. Black & Drayton, for the defendant.

GARRISON, V. C.

Michael J. Tuite married the defendant in the year 1868. He engaged in several businesses thereafter until 1877, in each of which he was unsuccessful, owing to his habits with respect to drinking. In 1877 he started in the junk business in a very modest way. He still continued to drink, and frequently became incapacitated therefrom, during which periods he transacted no business. His wife always was an active aid to him in his busi-

ness. They managed to lay by a little money, and in October of 1883 two lots of land, costing less than \$400, were purchased in the name of the wife. This property was undoubtedly hers, and the charges in the bill concerning it utterly failed of proof.

Michael J. Tuite was ill for a considerable time before his death, and at the time of his death on the 9th of February, 1885, did not leave much property. He had no real estate. Whatever he had was the accumulated junk in the lower part of the house in which they lived, and the horses and wagons used in the junk business. There is considerable dispute between the witnesses for the respective parties as to the amount and value of this property, but it is obvious that it was not great. I am inclined to the opinion that \$1,000 is an ample, but not accurate, estimate of the value of all the property that he left.

No administration was taken out upon his estate. At the time of his death the children were respectively aged as follows: Delia, sixteen; Sarah, fourteen; Peter, twelve; Ellen, eight; Ann, three years, and Michael, one month.

The junk business was continued, the widow taking out the license required by law in her own name. Men were hired to go out on the wagons, and were given money with which to buy junk, which was then brought to the house where the parties lived, was there sorted, if it required sorting—as the rags and other material of that character did—and was then sold to dealers in the different classes of material.

Delia, both before and after her father's death, engaged in sorting the rags. Sarah for a time sorted, but almost immediately after her father's death ceased doing this and engaged in work about the house. Peter went out on one of the wagons with the men and helped the best he could. The others were too young to do anything.

The girls were sent to school, some of them for short periods and others for considerable periods, and two of them at least were fairly well educated—that is, Ellen and Ann. All of the children lived at home with the mother, and she paid all of their expenses of maintenance and education. The business was under the direct management and control of the mother, and what

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moneys she received therefrom she invested in the real estate described in the bill.

I do not find any evidence to support the charge of the bill that there was any agreement or understanding between the mother and the children that she was trustee for them with respect to the real estate purchased by her, in her own name, from the profits of the business. I think it would waste time to either analyze the evidence or cite authorities for what, to me, is so plain a situation.

I therefore conclude that the complainants are not entitled to relief on the case made by the bill.

The testimony of the complainants, while it did not refer to or concern in any way any agreement with the mother by which she was to act as trustee for them, did seek to show that there was a general partnership agreement between the mother and all six of the children, and that by the terms of the said partnership agreement the business was to be carried on and the profits were to be divided equally among all of the partners. They seek to show that this agreement was first entered into immediately after the father's death in 1885, at which time the eldest child was sixteen years old and the youngest one month.

The law with respect to the proof of partnerships *inter sese* will be found in *Hallenback v. Rogers*, 57 N. J. Eq. (12 Dick.) 199 (*Vice-Chancellor Grey*, 1898); *affirmed*, 58 N. J. Eq. (13 Dick.) 580. But the facts in the case at bar do not, in my judgment, make it necessary to devote much time to the consideration of such principles. I utterly failed to find any credible evidence upon which any finding of a partnership could rest. It passes belief that a mother would enter into a partnership with her own children (the eldest of whom, a girl, was sixteen years and the youngest of whom was one month old), and would agree that each should have an equal share of the profits, while she, so far as they allege, was alone responsible for all the losses.

Furthermore, there was no possible consideration for such an agreement. The mother was entitled to the earnings of her children during their minority. *Campbell v. Campbell*, 11 N. J. Eq. (3 Stock.) 268 (*Chancellor Williamson*, 1856); *Osborn v. Allen*, 26 N. J. Law (2 Dutch.) 388 (*Supreme Court*, 1857);

Furman v. Van Sise, 56 N. Y. 435 (1874). And if they worked for her, under her direction and control, they but did their duty to her, and there is therefore no possibility of importing any consideration into any such agreement as they allege was made. Upon the theory, therefore, that there was a partnership between the complainants and the defendant I find that complainants could not succeed, even if they amended their bill by appropriate allegations to charge such an agreement.

It is proven that there was no administration taken out upon the estate of Michael J. Tuite, and that whatever personal property he possessed at the time of his death was taken possession of by his widow, the defendant. The children, of course, were entitled to two-thirds of the value of such property after the debts and administration expenses of the decedent were paid. Undoubtedly the defendant is accountable for the children's share of the property which she thus possessed herself of at that time. It may be that if she used the money derived from this property for their support, such expenses will be allowed to her. *Pyatt v. Pyatt*, 46 N. J. Eq. (1 Dick.) 285 (*Court of Errors and Appeals*, 1889).

Under our statute (2 Gen. Stat. p. 1426 § 3, tit. "Executors and Administrators") she is chargeable with the value of all such property, less all payments made by her which a lawful administrator might have been credited with under the laws of this state.

She was not proceeded against in this case as an executrix *de son tort*, and no personal representative of the decedent is a party hereto, and the frame of the bill is not such as to raise the proper issues and secure appropriate relief from her as such. Since the estate is very small, and considerable expense has been incurred by the proceedings in this present suit, and much testimony has been taken which will be available in such an accounting, if one is to be had, I have determined to permit the complainants, if they so desire, to move to amend their bill so as to seek an accounting from this defendant for the property of Michael J. Tuite which came into her hands at the time of his death, making a representative of his estate a party, if they shall be so advised. As to this, see 1 Dan. Ch. Pr. & Pl. 319; *Flagler*

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Babbitt v. Fidelity Trust Co.

v. *Blunt*, 32 N. J. Eq. (5 Stew.) 521 (Chancellor Runyon, 1880); *Jenkins v. Freyer*, 4 Paige 47.

If the complainants do not move to amend their bill within ten days after the date of the filing hereof, then I will advise a final decree dismissing this bill, with costs.

ANNA D. BABBITT

v.

FIDELITY TRUST COMPANY et al.

[Decided May 16th, 1907.]

1. A trust declaration and assignment, by which C. transferred all his property to a trustee, provided that the trustee should pay the interest on outstanding notes, bonds, mortgages, &c., given or endorsed by C., and from time to time reduce and cancel the same, and hold and retain without action, and without collecting interest thereon, all notes and securities given by C., or by his son, daughter and son-in-law, until the death of C., and then to cancel them.—*Held*, that a mortgage by the son-in-law, a bond of the daughter, and notes of the son, endorsed by C., were to be canceled at his death, and the trustee should be credited with the sum expended in the payment of the same.

2. Under this trust declaration and assignment, where a note was not made before the making of the declaration of trust, and was not a renewal of any note or notes existing at the time of the execution of the trust, the trustee was not warranted in paying it from the estate.

3. Where real estate was transferred to a trustee to hold or convey the same as he thought best, items paid real estate agents and others as commissions on sales of real estate, which were shown to be reasonable commissions for the services rendered, were properly charged against the trust estate.

4. Where a party transferred all his property to a trustee, it was proper for the trustee to pay for the services of the lawyers engaged in making the transfers and the declaration of trust and in giving advice concerning the proper way to accomplish the object of the settlor.

5. A settlor, at the time of making a declaration of trust, owned and transferred to a trustee shares of stock in an insurance company. The execution of a scheme whereby the trustee attempted to obtain a majority of the stock of the insurance company was prevented by the court, and

the stock of the insurance company depreciated in value so that the stock of the trust estate sold after the defeat of the scheme brought much less than that sold before.—*Held*, that it could not be said that the trustee should have known that the necessary result of the proposed scheme would be to depress the price of the stock of the insurance company, and he should not be surcharged with the difference between the selling price of the stock before the defeat of the scheme and the lower price at which it subsequently sold.

6. Where a person transferred all his property to a trustee to hold as a trust fund, it was a general trust, and if the trustee held stock which came to him from the settlor, and which were not securities he was authorized by law to hold, he should be surcharged with the difference between the market value of the stock at the time he should have sold it and the lower price at which it subsequently sold.

7. Where a declaration of trust declared that the trustee hold the property transferred in trust for the following uses and purposes, "to hold or convey the same as in his judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time," the trustee was to exercise his discretion only in doing authorized things, and could not hold securities transferred to him which he was not by law authorized to hold.

8. Where a trustee's conduct was not willfully wrong, and he has not confused accounts or unwarrantably used trust moneys, and has large resources, so that the making of unauthorized investments could not prejudice the interest of the *cestui que trust*, the fact that he was subject to surcharge in certain respects is insufficient to defeat his right to commissions.

9. Where a trustee was held to a strict accountability, had charge of a large estate of a most varied character, was required to exercise due diligence in the calling in of all unauthorized investments, and had duties and responsibilities not incident to the care of an ordinary trust estate, four per cent. upon the principal was a proper allowance for his compensation.

Heard on bill, answers, cross-bill, replications and proofs.

On the 19th day of July, 1898, Charles G. Campbell, by appropriate instruments, transferred all of his property of every description to the Fidelity Trust Company, of Newark, as trustee.

The latter on that date executed a declaration of trust with respect to the said property. In said instrument it

"declares that it holds the property, real and personal, this day conveyed to it by Charles G. Campbell in trust for the following uses and purposes: (1) To hold and possess or dispose of and convey the same, by

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proper instruments of conveyance, as in its judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time. (2) To collect the income from the personal property, and the rents, issues and profits, from the real property."

By other provisions it undertakes to attend to the taxes and repairs upon the real estate, to the payment of interest on outstanding notes and other obligations, and to their reduction and cancellation, and to pay the proper expenses arising in the execution of the trust.

The net income is to be paid monthly, in certain stated amounts, to the settlor, his sisters, his son, Charles B. Campbell; his daughter, Anna D. Graham (since intermarried with Babbitt), and the father of a deceased daughter's children.

Upon the death of Charles G. Campbell certain sums are to be paid to his sisters and the balance is to be divided among his heirs-at-law according to the intestate laws of this state, the personal property according to the statute of distributions, and the real property according to the statute of descent.

There are other provisions which will be stated as occasion requires it.

Charles G. Campbell died on the 29th day of May, 1905, and left him surviving his daughter, the complainant; Charles B. Campbell, a son, and Robert C. Denny, Walter B. Denny and Julia Denny, children of Jennie B. Denny, deceased, who was the daughter of Charles G. Campbell and the wife of Edward B. Denny.

The bill in this case is filed by Anna D. Babbitt. She obtained loans from certain non-residents and made certain assignments of her interest in the estate of her father to secure the same.

The bill in this case was framed not only to secure an accounting from the Fidelity Trust Company, the trustee, but also sought to litigate certain questions between the complainant and those to whom she had executed the assignments. These latter, being then represented by non-resident executors, filed a plea to the bill, and the issue raised was disposed of by this court adversely to the complainant. The report will be found in 70 N. J. Eq. (4 Robb.) 651 (Vice-Chancellor Garrison, 1906).

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The suit thereupon proceeded as one of accounting between trustee and *cestui que trust*.

All of the other beneficiaries under the declaration of trust, or their assignees, are parties to this suit.

The trustee, in addition to filing an answer and account, also filed a cross-bill praying, among other things, for a construction of certain portions of the declaration of trust, and for directions concerning its duty under certain provisions thereof.

The complainant filed exceptions to numerous items of the trustee's account. Issues were properly joined and are to be herein disposed of.

Mr. Henry H. Fryling and Mr. Chandler Riker, for the complainant.

Mr. Samuel W. Beldon, for the Fidelity Trust Company, defendant.

Mr. Edward D. Duffield (with whom was *Mr. J. J. Burke*, of the Nebraska bar), for Charles B. Campbell, defendant.

Mr. George R. Dutton, for Florence Joel, defendant.

GARRISON, V. C.

The property which Charles G. Campbell had, and which, on the 19th day of July, 1898, he turned over to the Fidelity Trust Company as trustee, was of varied character and of large value. It consisted of real estate, mortgages, bonds, stocks of companies, furniture, pictures, bric-a-brac, money in bank, and other characters of personal property such as an active business man of large means would possess. The face value exceeded the actual value by many thousands of dollars, because among the property turned over were interests in real estate which could not be realized upon, and in some instances the real estate could not be located, and also among the property were bonds and stocks of various companies, which latter were defunct, or, if in existence, the stock of which had no value.

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The realized value exceeded \$400,000, with some items still undisposed of in the trustee's hands.

The account of the trustee is a very long one, and shows total receipts, principal and interest, of over \$700,000, among the numerous items of disbursement being advancements made to the various parties to this suit on account of their distributive shares.

A number of the questions raised under the exceptions were disposed of at the hearing by consents or arrangements between the parties, and only need to be stated without discussion. Others of the exceptions may be grouped, and so much of the trust deed as requires construction for the purpose of determining the rights of the parties need not be discussed separately, but will be dealt with in connection with the subject-matter which it concerns.

I.

The first exception concerns a series of promissory notes, all, excepting two, of which were made by Charles B. Campbell, the son of Charles G. Campbell (or by firms of which Charles B. Campbell was a member), and endorsed by Charles G. Campbell, the money going to Charles B. Campbell.

After the making of the deed of trust these notes were renewed, and such renewed notes were paid by the trustee. The two notes not coming within the above statement are one made by Denny Brothers and endorsed by Charles G. Campbell, and one made by Campbell & Osborne and endorsed by Charles G. Campbell, and paid to the Merchants' National Bank.

The point of the exception is that, under the declaration of trust, the trustee, if it paid such notes, must hold them and charge the amount thereof against the distributive share of the maker of the note. This, of course, depends upon the proper construction of the declaration of trust. This instrument has two clauses which concern this matter of obligations of Charles G. Campbell existing at its date, the fourth and the tenth clauses.

The fourth clause is as follows:

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72 *Eq.*

"(4) To pay the interest on outstanding notes, bonds, mortgages, &c., given or endorsed by the said Charles G. Campbell, and to provide from time to time for the reduction and cancellation of the same as may be deemed advisable, provided it be done, so far as possible, without interfering with the execution and performance of the trusts hereinafter set forth."

The tenth clause is as follows:

"(10) To hold and retain, without action and without collecting interest thereon, all notes and securities given to Charles G. Campbell by Charles B. Campbell, Anna D. Graham and Edward B. Denny, and now held by assignment by Fidelity Trust Company until the death of the said Charles G. Campbell, and then to cancel and deliver them, without charge, to the said Charles B. Campbell, Anna D. Graham and Edward B. Denny, their respective heirs, executors and administrators."

At the time of the making of the declaration of trust there was held by the settlor and delivered to the trustee a mortgage of E. B. Denny, the settlor's son-in-law, for \$2,100, and notes of his for \$8,710. At the same time there was held by the settlor and delivered to the trustee company a bond of Anna D. Graham, the complainant, for \$20,976.51. Under the provision of the tenth clause these two obligations were canceled at the time of the death of Charles G. Campbell, and the amounts thereof thus became gifts by the settlor to each of the persons named.

There were no notes or other securities of Charles B. Campbell held by the settlor and transferred to the trustee, but there were between \$16,000 and \$17,000 worth of notes of Charles B. Campbell, endorsed by Charles G. Campbell, outstanding in the hands of those who had discounted them.

It is evident that it was with these notes in mind that the fourth clause was inserted.

The exceptant contends that the proper meaning to be ascribed to this fourth clause is that the trustee is to reduce the notes, if it deems advisable, and if, by reduction, they are finally paid off, the trustee is to hold the paid-off note and charge it, after the death of Charles G. Campbell, against the distributive share of the maker of the note.

I do not think that this is the correct construction of this clause, or that it was the meaning of the settlor. I think it clear

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that this settlor, who was disposing of all of his property, and had clearly in mind that which he wished to do with it, desired to treat his son Charles, his daughter Anna, and his deceased daughter's husband and her children with similar bounty. At the time of the making of the instrument he had advanced money to his son-in-law and to his daughter, and had obligated himself upon the notes of his son. I think it entirely clear that by these two clauses he intended that where he had actually made advances and held an obligation therefor such obligation was to be retained by the trustee without action, and was, at the distribution of the estate, to be canceled and delivered to the obligor, and similarly he intended that the obligation which he had undertaken for his son by endorsing his notes should be met by the trustee from time to time, and when met the note should be canceled.

I cannot conceive of any meaning to be given to the word "canceled" in the fourth clause excepting the well-known one "to render null and void."

This works out the scheme of equity which I think was in the mind of the settlor.

I hold, therefore, that when this estate is to be distributed the trustee is to be credited with the payments of the notes of Charles B. Campbell endorsed by Charles G. Campbell.

This holding also applies to the notes of Mrs. Babbitt, the complainant, which were endorsed by her father and paid by the trustee, and also to the note of Denny Brothers, which was the title under which Edward B. Denny traded.

These notes were in existence at the time of the making of the declaration of trust, and were renewed and subsequently paid by the trustee, and therefore come within the language of the fourth clause.

The only remaining note to be dealt with is that which was in the Merchants' National Bank. This note was made by Campbell & Osborne and endorsed by Charles G. Campbell. There is no evidence that this note was a renewal of any note or notes existing at the time of the making of the declaration of trust. I cannot find any warrant or authority for the trustee paying this note out of the estate. If it has paid the same, it must

either be surcharged with it, or must, as between the parties hereto, charge the same against the distributive share of Charles B. Campbell.

II.

The next exception relates to items in the account of commissions on principal retained by the trustee.

Undoubtedly the trustee can only retain such commissions on principal as are fixed by this court, and the matter of this exception will be dealt with in adjusting the matter of commissions.

III.

The next exception relates to the investment in the gold notes of the Public Service Corporation. The amount involved is \$99,750, and the point of the exceptant was that the investment was not one authorized by law.

By consents made at the time of the final hearing this matter was satisfactorily adjusted, the trustee agreeing to charge itself with whatever the proper sum was in respect to this item.

IV.

The next exception relates to the payment on account of the distributive share of Charles B. Campbell in advance of payments of any of the other distributees, and merely requires adjustment of interest items.

V.

The next exception relates mainly to items paid to real estate agents and others as commissions on the sales of real estate. These were shown to be proper commissions for the services rendered, and I think it entirely proper to charge them as the trustee has. Any effect which the rendering of these services by

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others should have upon the amount to be allowed to the trustee will be taken into account in fixing its compensation.

The items in this exception which are not covered by the above statement are for lawyers' services, and only one item is questioned, the other one being conceded to be correct at the hearing. The questioned item has to do with services at the time of the making of the declaration of trust. I think it clear, since Charles G. Campbell was transferring everything he owned to the trustee, that it is a proper item for the trustee to pay for the services of the lawyers engaged in making the transfers and the declaration of trust, and in giving advice concerning the proper way to accomplish the object of the settlor.

I therefore allow this item.

VI.

The matter of interest on net bank balances was adjusted at the trial, and was set off against the right of the trustee to charge interest on advances to the distributees.

VII.

The only remaining question under the exceptions relates to the conduct of the trustee concerning shares of stock of the Prudential Insurance Company.

The par value of this stock is \$50, and much confusion resulted at the trial because the custom is to sell two shares at one time and call the same "a full share"—that is, the custom is to deal with this stock as if the par were one hundred, and deliver two shares to make what is termed "one full share." To avoid confusion I have dealt with the stock as it actually was, namely, each share at a par of \$50.

At the time of the making of the declaration of trust the settlor owned and transferred to the trustee one hundred and sixty-seven and twenty-seven hundredths shares of such stock. This was disposed of by the trustee at the following rate per

share of \$50 each: February 23d, 1899, sixty shares at \$360; February 6th, 1900, thirteen shares at \$350; August 20th, 1901, twenty shares at \$375; December 7th, 1903, thirty shares at \$200; December 23d, 1903, twenty-five shares at \$195; January 25th, 1904, nineteen and twenty-seven hundredths shares at \$200.

It will be observed that the first three sales averaged about \$360 a share, and that these took place prior to the year 1903. The sales made after that date do not average quite \$200 per share. The proofs show that down to about November, 1902, the stock of the Prudential Insurance Company was readily salable at about the average figure shown above, namely, \$360 per share, and that since that date the latter average has been about the obtained price, namely, \$200 per share.

At about the date in 1902 just mentioned the Fidelity Trust Company and the Prudential Insurance Company endeavored to carry out a scheme by which each should own a majority of the stock of the other, and by this means the existing management in each company could perpetuate its control. In execution of this scheme the Fidelity company offered the stockholders of the Prudential Insurance Company \$300 per share for one-half of their holdings. It succeeded in purchasing two shares over one-half of the capital stock of the Prudential Insurance Company. This court (*Robotham v. Prudential Insurance Co.*, 64 N. J. Eq. (19 Dick.) 673 (*Vice-Chancellor Stevenson*, 1903) prevented the execution of this scheme, and the Fidelity Trust Company parted with sufficient of the stock to reduce its holdings below a majority.

The exceptant charges that the trustee, the Fidelity Trust Company, should have known that the scheme it embarked in with respect to the Prudential stock would depress the price or value of that stock, and therefore it should be surcharged on the stock held in this trust, with the difference between the selling price of the stock before it entered upon the execution of the scheme and the lower price at which the stock subsequently sold.

Applying to the trustee the rule of care to which it was subject, I cannot say that I find that it should have known that the necessary result of the proposed scheme would be to depress the

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price of the stock of the Prudential Insurance Company. The scheme was undoubtedly conceived with the purpose of perpetuating the management of those then in the control of each of these companies. But, as appears by the facts stated in the cited case, each was solvent and possessed of large assets and of a great and valuable business, and the business of each was growing and not diminishing, and I do not think it fair to infer that a reasonable man should have believed that perpetuating the then management would lessen the value of the stock of either of the companies. Whatever the result may have shown the fact to be, I do not believe that at the time the scheme was proposed and was attempted to be carried out there was any thought in the minds of the parties that it would decrease the value, in the market, of the stock of the companies concerned. The very fact that the parties engaged wished to retain control, and invested large sums of money for that purpose, shows that they thought that each institution was a valuable one and would so continue.

I do not therefore concur in the point made by the exceptant that, under the rule concerning the care with which a trustee is chargeable under such circumstances, this trustee is to be surcharged in this respect.

I do find, however, that the trustee is to be surcharged with the difference between the fair market value of this stock down to 1903 and the price at which it was sold in 1903 and 1904, for the reason about to be given.

The trust in this case was of a unique character. It was a transfer by a living person of all of his property of every kind and description, including even his household goods and his money in bank. It was, in the broadest sense of the word, a general trust. Under such circumstances I think it the duty of the trustee, so soon as it could do so in the exercise of reasonable diligence and good judgment, to convert the securities which came to it from the settlor into cash and invest the same in securities authorized by law.

It is admitted by all of the counsel in the case that there is no statute law involved, excepting to the extent that the statute points out the investments in which trustees are authorized to

place trust moneys, and it is conceded that the stock of the Prudential Insurance Company is not one of those so authorized.

The general principle deducible from the cases and text-books is well stated in *17 Am. & Eng. Encycl. L.* 454, as follows:

"While a fiduciary may, as a rule, in the exercise of his discretion, retain such investments as are proper for the fiduciaries to hold, all others he must call in, and invest the proceeds in an authorized manner." *Perry Trusts*, §§ 460, 461, 465; *Ashhurst v. Potter*, 29 N. J. Eq. (2 Stew.) 625 (*Court of Errors and Appeals*, 1878).

The trustee in the case at bar seeks to escape the responsibility involved in the application of this principle. In the brief of counsel for the trustee its position is thus stated:

"The rule contended for has undoubted existence, but is not of universal application. It is applicable to trusteeships where the subject of the trust has come to the trustee as a *general* estate or an *aliquot* portion of an estate, but is not applicable where it comes as certain and specific property, unless there be a direction to convert."

It therefore insists—

First. That this was a trust of a specific thing, and that it was entitled to hold that thing, chargeable only with the exercise of reasonable discretion.

Second. That by the declaration of trust it was given discretion with respect to investments, and therefore is not chargeable for anything excepting negligence.

As I have before said, I do not concur at all in the view that this is a trust of a specific thing, or that this is a case to which the authorities relating to duties of trustees under trusts of specific things can be applied. It is true, of course, that a specific thing, or rather a great number of specific things, were by this settlor turned over to this trustee, but the real transaction was a turning over by the settlor of everything that he possessed to the trustee for it to handle and manage under its obligation as trustee, subject to the responsibilities thereof.

I shall not stop to cite or analyze the various cases in which the subject-matter of the trust was held to be specific, but will content myself with saying that in each case, as I have read them, it was clear that the settlor intended that the identical thing transferred should be held by the trustee. There is not

the slightest evidence in this case of the settlor's intention that this trustee should hold any specific thing, and it is quite clear, I think, from the circumstances, that there could have been no such intention. Among other property transferred to the trustee were household furniture, pictures, bric-a-brac, and money in banks. Certainly it was not intended that these several species of property were to be held *in specie* by the trustee. Similarly there is nothing to show that any of the transferred property was to be so held. The intention clearly shown was to hand over all of the property owned by the settlor to the trustee for the latter to deal with as trustee, and under such circumstances the law is clear that the trustee can only escape responsibility by converting the unauthorized securities thus transferred to it into authorized securities so soon as it conveniently and reasonably may do so.

In the case in hand it is clearly shown that it could have sold the Prudential stock during the years 1898, 1899, 1900, 1901 and 1902 for at least \$360 per share. The income from this stock was very small, being ten per cent. upon \$50 par, and therefore about one and one-half per cent. on the market value of the stock. There was therefore no reason, properly viewed by the trustee, to induce it to hold an unauthorized security, paying so little, at a time when the market for its sale was open and a large price could have been obtained for it, and that price could have been invested in authorized securities to yield a rate of interest at least three times greater than that received from the then investment.

With respect to the argument that by the terms of the declaration of trust the trustee was so vested with discretion that it is not chargeable for maintaining unauthorized investments it is necessary to refer to the language of the instrument.

The material part thereof is that in which the trustee declares that it holds the property, real and personal, in trust for the following uses and purposes:

"To hold and possess or dispose of and convey the same, by proper instruments of conveyance, as in its judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time."

From this clause the respective parties draw diametrically opposing meanings. The complainant insists that the meaning of this clause is that the trustee has enjoined upon it the absolute duty of collecting the principal of securities. In other words, it draws from this clause the inference that the settlor intended to direct the trustee to collect the principal of securities, and therefore it has not only the duty cast upon it by law, but also the positive injunction of the settlor with respect thereto.

The trustee, on the other hand, lays great stress upon the presence of the words "as in its judgment may be deemed advisable," and argues that they relate not only to the first part of the sentence concerning conveyances, but also to the last part of the sentence. It therefore repudiates the idea that it was directed to collect the principal of securities, and contends that the whole matter was left to its discretion, and it can only be chargeable if negligent.

The trustee further argues that stocks are not "securities," and therefore, even if it is required to collect the principal of securities, this would not relate to stocks generally.

I do not find it necessary to determine whether this clause should be construed so as to positively require the trustee, by force of its terms, to convert the securities, including the stocks, into money, and reinvest the same in authorized securities, because I think the result of a fair reading of this clause in any legitimate way is not to vest in the trustee any greater or other discretion than is vested in trustees generally.

Differently stated, I think that this clause confides the property to the trustee to be dealt with as its judgment deems advisable, subject to those rules which govern trustees; that its discretion, in other words, was not to do unauthorized things, but to exercise its judgment concerning what authorized things it would do.

I do not find from the authorities that it is the rule to exempt trustees without a clear and unequivocal statement of intention to that effect made by the maker of the trust in the instrument creating or evidencing it. *Ward v. Kitchen*, 30 N. J. Eq. (3

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Stew.) 31 (*Chancellor Runyon*, 1878); *McCullough v. McCullough*, 44 *N. J. Eq.* (17 *Stew.*) 313 (*Chancellor McGill*, 1888); *Halsted v. Meeker's Executors*, 18 *N. J. Eq.* (3 *C. E. Gr.*) 136 (*Chancellor Zabriskie*, 1866); *King v. Talbot*, 40 *N. Y.* 90; *Adair v. Brimmer*, 74 *N. Y.* 539; *Clark v. Beers*, 23 *Atl. Rep.* (*Conn.*) 717; *Spratt v. Wilson*, 19 *Ont.* 28; *Kimball v. Redding*, 31 *N. H.* 352.

In the case of *Tuttle v. Gilmore*, 36 *N. J. Eq.* (9 *Stew.*) 617 (*Court of Errors and Appeals*, 1883), the clause limiting the liability of the trustee provided that he should not be liable or responsible for any other cause, matter or thing except his own willful and intentional breaches of the trusts therein expressed and contained. The present chancellor, in writing the opinion of the court, said: "It is a breach of trust for the trustee to speculate with trust funds for his own gain, but it is no less a breach of trust to make unauthorized investments. * * * To do so knowingly is a willful and intentional breach of trust. In my judgment it is a willful and intentional breach of trust, within the meaning of this clause, to knowingly do any act hazarding trust funds in violation of a duty imposed on a trustee. That this construction may leave but little force to the clause is no reason why it should not be adopted."

It will thus be seen that it is settled in this state that a clause restricting the responsibility of the trustee, in terms much broader and more comprehensive than in the case at bar, was held not to exonerate the trustee.

In the same case the court holds that "a strict rule of construction should be applied as against the claim of restriction."

I therefore conclude that this trustee is chargeable with the difference between the price at which the seventy-four and twenty-seven hundredths shares were sold in 1903 and 1904, namely, about \$200 per share, and \$360 per share, which I find to be the price at which it could have been sold at any time within five years after the date of the execution of the declaration of trust.

VIII.

The remaining question relates to the matter of compensation to the trustee.

While it was urged by the complainant in her brief that there should not be any allowance of commissions to this trustee, I can perceive no legitimate ground for withholding the same.

It is true that in certain respects this trustee is found by the court to be subject to surcharge, but its conduct has not been willfully wrong, nor has it confused accounts, unwarrantably used trust moneys, or done any of the things which have been held to disentitle trustees to compensation.

It is, of course, true that a general rule of law applies alike to those possessed of small means as well as those possessed of large, but it is equally true that where a trustee is possessed of very large resources, as this trustee is, and therefore nothing that it has done could possibly jeopardize the interests of the *cestui que trust*, and the latter would, in every event, receive all that the court found due to them, a different situation exists than if a trustee of meagre resources should make unauthorized investments and thereby jeopardize the interests of the *cestui que trust*, and make it possible that they would lose what ought to come to them.

I see no reason for treating this trustee in any other than the normal way in fixing its compensation.

The discretion of this court in this class of cases as to the amount to be allowed is unfettered by statute, and the compensation should be based on the nature and amount of the services rendered and the risk incurred by the trustee. *Van Houten v. Van Houten*, 45 N. J. Eq. (18 Stew.) 796 (*Court of Errors and Appeals*, 1889).

Holding this trustee, as I do, to a strict accountability, I think that its allowance should be commensurate with such responsibility. If the contention of the trustee was found to be sound, and it was only chargeable for negligence, and would be held to have done its duty if it merely retained the securities and col-

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lected the income, then I think a small allowance would compensate it fully for its responsibility. (I am only speaking of an allowance upon principal, because, under the terms of the declaration of trust it was to receive five per cent. upon the income, and it has already, under such clause, taken its commissions on income.) But I think that where a trustee has a very large estate, such as this one was, of a most varied character, handed over to it, and is required by the rule, applied to it by the court, to exercise due diligence in the calling in of all unauthorized investments and the duty of investing in authorized securities, it should be paid a proper sum to compensate it for this labor and the responsibility and risk involved.

In view of the rule which I apply to this trustee, I do not think that four per cent. upon the amount of principle is too large a sum for the time, labor, responsibility and risk involved. It had the estate in its charge from 1898 to date, and, in addition to the ordinary duties in an ordinary trust, there were unique duties imposed upon this trustee, because, as has been before stated, many of the apparent securities turned over were worthless, and that fact could only be ascertained after patient investigation and much trouble, and in each instance it had to take the risk of its conduct. And, with respect to the valuable property, it performed its duties well, the surcharge resulting from a misconception of duty and not from a willful disregard thereof.

In the *Van Houten Case* (cited above) the court of errors and appeals set the figure as three and one-half per cent.; I think the additional one-half per cent. allowed by me in this case fairly represents the additional services and risk involved.

Application is made by the various counsel for costs, including counsel fees, to be paid out of the estate. This seems to be of the class of cases in which, under the practice and as a matter of authority, allowances should be made. *Trustees v. Greenough*, 105 U. S. 527; 26 L. Ed. 1157.

The matter of the amounts may be settled upon the settling of the decree, which will be done upon notice.

Sparks v. Ross.

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AMELIA R. SPARKS et al.

v.

CHARLES S. ROSS et al.

[Submitted January 22d, 1907. Decided February 1st, 1907.]

1. When a feigned issue is framed in equity and sent to a law court for trial before a jury, it is proper for the trial court to direct a verdict if the evidence justifies the peremptory instruction given.

2. A ceremonial marriage was followed by fifteen years' cohabitation, and terminated only by the death of the husband. During that time a family of children was raised by the parties to the marriage. These facts created a powerful presumption of the legality of the marriage. To have overcome this presumption sufficiently to have justified an instructed verdict against its legality, the evidence of a prior marriage should have been conclusive in its nature.

3. The presumption of legality arising from a ceremonial marriage, followed by cohabitation of the parties as husband and wife, is founded upon the motives which govern human conduct and upon the policy of our social system. The conclusion of illegality involves the assumption that the parties have exposed themselves to the penal consequences of illegal acts, and operates to bastardize their offspring. The strength of the presumption increases with the lapse of time through which the parties have cohabited as husband and wife.

4. Certain proofs offered of a prior marriage held to be insufficient to justify an instruction against the presumption of legality of a subsequent marriage, followed by long cohabitation.

On bill to quiet title. Motion for new trial on return of *postea* of feigned issue.

Complainants filed a statutory bill to quiet title. At the preliminary hearing in this court complainants were found to be in peaceable possession of the land in question. Defendants demanded an issue at law for the trial of the controverted facts upon which title depended under the issues as framed, and a feigned issue was accordingly awarded by this court. At the trial before the law court a verdict was rendered in favor of complainants (defendants in the feigned issue) by direction of the

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trial court, and a motion for a new trial is now made in this court on the return of the *postea* to the feigned issue.

The sole question for determination by the issue at law, as framed, was whether the marriage which was celebrated between Edmund B. Ross and Mary Cavanaugh, October 24th, 1873, was a lawful marriage, or whether on that date, and until his death, Edmund B. Ross was the lawful husband of Maria Moose, and therefore incapable of marriage with Mary Cavanaugh. The purpose of that issue was to ascertain whether the children of Edmund B. Ross, born to him by Mary Cavanaugh, were born in lawful wedlock. The verdict instructed by the trial court was as follows:

"You will find for the defendants that Edmund B. Ross was, on the 24th day of October, 1873, the husband of Maria Moose, and continued to be her husband until his death, and that the said Maria Moose is still living."

The evidence offered by the plaintiff in the feigned issue consisted of the testimony of Mary Ross, formerly Cavanaugh, and two of her sons, Clarence and Charles, and of one Emma Scull. Mary testified to her marriage to Edmund Ross October 24th, 1873, at Bridgeboro, New Jersey, and produced her marriage certificate, which was received in evidence without objection; that she and her husband resided together as husband and wife from the date of her marriage until his death, July 19th, 1888; that, except the first year or so, they resided, during all of that time, in South Jersey; that nine children were born to them, three of whom are now living; that she never heard of Maria Moose, or of any prior marriage of her husband, until about the time of this litigation. Her two sons testified that they never heard of Maria Moose until this litigation. Emma Scull testified to her knowledge of Mary and Edmund living together as husband and wife and having children.

The evidence offered by defendant in the feigned issued consisted of—*first*, depositions of Maria Prehl. Maria testified that her maiden name was Maria Moose, and that she was married to Edmund B. Ross December 4th, 1862, at the home of her parents near Bridgeport, New Jersey; that Edmund resided with her,

at her parents' home, until the following spring, when he went away, at the invitation of his father-in-law, and they never resided together afterwards; that she saw Edmund but once thereafter, namely, in the following summer, when he, with a gentleman friend of his, drove to the house of her parents, but did not get out of the wagon; that she, at the time, was in the garden; that a child was born to her October 23d, 1863, named Joseph, who died at ten years of age; that she married Augustus Prehl July 21st, 1870, and then knew that Edmund Ross was alive; that she destroyed her first marriage certificate when she remarried. Arthur J. Hendrickson testified that he had known Maria from her childhood and that she and Edmund Ross resided together at one time at the home of Maria's parents; that he understood them to be married; as to how long they lived there together he was uncertain; that Maria had a son named Charley. Mary Adamson testified that she knew Maria and Edmund and that some forty-two or forty-three years ago Edmund stopped at her home and said that he was married to Maria and that he was on his way there; that she knew, in a general way, that Edmund resided with the Moose family for a time, but that she never actually saw him there. A record book of marriages from the county clerk's office of Gloucester county was offered and received in evidence. It contained the record of a certificate signed "Jacob Loudenslager, Elder of the M. E. Church," certifying that he had married Edmund B. Ross and Maria Moose December 4th, 1862. The certificate bore no date but was recorded July 29th, 1864. A diary, shown to have been a diary of Jacob Loudenslager, now deceased, was offered and received in evidence. This diary contains an entry indicating that Jacob Loudenslager married these parties on the date named. George L. Dobbins, a Methodist minister, testified that in the Methodist church the word "Elder" imports an ordained minister of the gospel.

Mr. Thomas E. French, for the complainants.

Mr. Thomas J. Middleton and *Mr. John J. Crandall*, for the defendants.

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LEAMING, V. C.

I have reached the conclusion that the learned trial judge erred in instructing a verdict at the trial of the feigned issue in this cause. There can be no doubt of the right and propriety of a binding instruction in the trial of a feigned issue where the evidence justifies the instruction given, but the evidence must be such that a verdict contrary to the instruction could not stand. The evidence against which the peremptory instruction was given disclosed a ceremonial marriage followed by a cohabitation of the parties as man and wife for over fifteen years, and then terminated only by the death of the husband. During that period they raised a family of children, and, except for the first year or so, resided in the same general section of this state where the alleged first wife resided. This raised a powerful presumption of the legality of the marriage against which a binding instruction could only be properly given when that presumption was clearly overcome. The power of the presumption of legality of such a marriage is found in the motives which govern human conduct and in the policy lying at the base of our social system. The conclusion of illegality involves the assumption that the parties have exposed themselves to the penal consequences of illegal acts and operates to bastardize their offspring. Their conduct during the fifteen years was a living declaration of its legality. It is manifest that the evidence of a prior marriage should be conclusive before such presumption of legality can be said to be clearly and wholly overthrown. Touching this presumption of legality the text of *1 Bish. Mar., D. & S. § 956*, is as follows:

"Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality, not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. So that this issue cannot be tried like the ordinary ones, which are independent of this special presumption. And the strength of the presumption increases with the lapse of time through which the parties are cohabiting as husband and wife, it being for the highest good of the parties, of the children and of the community, that all intercourse between the sexes in form matrimonial should be such in fact, the law, when

administered by enlightened judges, seizes upon all probabilities and presses into its service all things else which can help it, in each particular case, to sustain the marriage and repel the conclusion of unlawful commerce."

In *United States v. Green*, 98 Fed. Rep. 63, Judge Shiras held that such a presumption was not overcome by proof of a prior ceremonial marriage, unless it should be also proven affirmatively that at the time of the prior marriage the parties were free from disabilities against a lawful marriage.

The evidence offered to establish a prior marriage is not, to my mind, of sufficient power to so clearly overthrow this presumption of legality as to warrant the peremptory instruction given. In the absence of positive evidence that "Jacob Loudenslager, Elder of the M. E. Church," was, in fact, at the time claimed, a stated and ordained minister of the gospel, the record of marriages and the diary offered in evidence carry but faint probative force.

Indeed, it is doubtful whether the marriage record is admissible in evidence as a statutory record in view of the requirement of the statute that the certificate be lodged with the recording officer within six months of the date of the marriage, whereas the record offered in evidence was made two years after the alleged marriage. See *People v. Etter*, 81 Mich. 570, 573. The testimony of the witnesses who were sworn in support of the prior marriage cannot properly be said to be of that character which commands absolute acceptance or affords a conclusive demonstration of the fact sought to be established.

A new trial will be advised.

2 Buch.McCarter v. Vineland Light and Power Co.

ROBERT H. McCARTER, attorney-general,

v.

VINELAND LIGHT AND POWER COMPANY.

[Submitted February 8th, 1907. Decided February 11th, 1907.]

1. The legislature has the power to bestow upon an individual the right to exercise those public franchises which can only be exercised through legislative sanction to the same extent that such powers can be bestowed by legislative enactment upon private corporations.

2. The act of March 11th, 1842 (*P. L. 1842 p. 164* which has been preserved by *Rev. Stat. 1846 p. 136 tit. 5 ch. 3 § 20; Rev. p. 192 § 85; P. L. 1896 p. 303 § 82*), authorizing the franchises of public utility corporations to be sold through the medium of receiverships, sanctioned the use of such franchises by an individual purchaser.

3. The act of March 11th, 1842, and the subsequent acts extending its operation, will not receive that strict construction which is applied to legislative grants, because the act grants no new rights, but simply makes provision for the transmission of title, by sale or lease, of rights already granted.

4. The act of February 17th, 1881 (*Gen. Stat. p. 3694 §§ 34, 35*), operates to withdraw legislative sanction for the use, by an individual, of the sovereign prerogatives purchased under decrees of courts, and requires their use by corporations created by the act *ex proprio vigore*.

5. On information, filed by the attorney-general, this court may restrain the unwarranted use of sovereign prerogatives.

On information by the attorney-general for injunction.

The information seeks to restrain defendant corporation from extending its gas mains through the highways of the borough of Vineland and township of Landis. Defendant was incorporated in the year 1900 under the General Corporation act. *P. L. 1896 p. 277*. Among the objects named in its certificate of incorporation is the power to perform the acts which are now sought to be restrained. No permission has been given to defendant, by either of the municipalities named, to open or occupy the highways. Defendant claims the right to do so as lessee of the franchises

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granted by the legislature to the Vineland Gas Light Company, by act approved March 15th, 1870. *P. L. 1870 p. 577*. That act granted to the company last named the right to lay gas pipes in the highways now in dispute. Defendant company claims title to the franchises of the earlier company in the following manner: In the year 1884 the Vineland Gas Light Company became insolvent and passed into the hands of a receiver appointed by this court. Pursuant to an order of court the receiver made public sale of all the property and franchises of the insolvent company and John R. Farnum became the purchaser at that sale. The sale was thereafter duly confirmed by the court. Farnum operated the works until the year 1900, when, on March 27th, he conveyed the same to Arthur A. Halbrook. The conveyance included all the real and personal property purchased by Farnum at the receiver's sale and some additional property and extensions of the works, and specifically included the franchises sold by the receiver. At the same time, though under date of March 31st, 1900, Halbrook and wife conveyed the same property, except the franchises, to defendant company, and, by a separate instrument, leased the franchises to defendant company for the term of ninety-nine years. Since that date defendant company has operated the works and made such improvements and extensions as the growth of the community has seemed to warrant. At the time the information was filed defendant was engaged in making further extensions, and the present information is filed to enjoin this proposed new work. The present application is for a preliminary injunction and has been heard on the information, answer and accompanying affidavits.

Mr. Edwin F. Miller and Messrs. Gaskill & Gaskill, for the informant.

Messrs. French & Richards and Mr. Leverett Newcomb, for the defendant.

LEAMING, V. C.

By act of March 11th, 1842, the legislature authorized the sale, through the medium of receiverships, of the franchises of public

2 Buch.McCarter v. Vineland Light and Power Co.

utility corporations. *P. L. 1842 p. 164.* This legislation, with but minor changes, has been preserved since that date. *Rev. Stat. 1846 p. 136 tit. 5 ch. 3 § 20; Rev. p. 192 § 85; P. L. 1896 p. 303 § 82.* This statute authorized the sale of the franchises of insolvent public service corporations to any person or persons for the unexpired term of the franchises, and bestowed upon the purchaser the use and enjoyment of the franchises so sold to the same extent that the stockholders of the corporation to which the franchises had been theretofore granted could have used and enjoyed the same. The corporations referred to by the act are only insolvent corporations engaged in work of a public nature, and the franchises referred to are manifestly such parts of the sovereign power as had been granted to the corporation—rights and privileges which can only be enjoyed through legislative grant. In the case of the gas corporation in question this would include the right to lay and maintain gas pipes in the public highways now in dispute for the purpose of supplying the public with gas. Unless some limitation can be found upon the legislative power to grant such franchises to an individual, the act must be regarded as vesting in an individual purchaser at the receiver's sale an absolute title to the franchises sold, including the power to operate under the franchises so conveyed to the same extent that the insolvent corporation could have operated; this necessarily includes the right to make extensions within the territory defined in the charter act of the insolvent corporation. I am not aware of any limitation upon the legislative power of the nature suggested. I apprehend that it is, at this time, within the legislative power to authorize gas works to be constructed and operated by an individual in substantially the same manner that such privileges are now conferred upon gas corporations. It is urged that a strict construction of the act authorizing sales of franchises must be adopted, and that such a construction will discover limitations upon the rights passing to the purchaser under the sale. I cannot regard the statute as one requiring that strict construction which is applied to legislative grants. The statute grants no new rights, but simply makes provision for the transmission of title, by sale or lease, of the rights already granted. *Black v. Delaware and Raritan Canal Co., 22 N. J.*

Eq. (7 C. E. Gr.) 130, 402. The title transmitted at the sale is to the highest bidder and cannot be regarded as a right bestowed in personal confidence and incapable of future transmission, or one that will terminate at the decease of the purchaser. The duration of the term for the enjoyment of the franchise is specifically defined by the act as the remaining portion of the term of the franchise as originally granted.

Our law appears to have contained no provision contemplating other than that a purchaser at such sale should be privileged to operate, as an individual, under the franchises so acquired by the purchaser or to transmit the title to the rights so acquired in the same manner that the title to other property rights could by law be transmitted, until the year 1875, the year that the constitutional amendments took effect. March 25th, 1875, an act was approved (*P. L. 1875 p. 41*) which provided that whenever any railroad, canal, turnpike, bridge (or) plank road, of any corporation of this state, should be sold under the decree of court or under power of sale in a mortgage deed, the person or persons for or on whose account the purchase should be made were, by the act, constituted a body politic and corporate and vested with

"all the right, title, interest, property, possession, claim and demand, in law and equity, of, in and to such railroad, canal, turnpike, bridge or plank road, with the appurtenances, with all the rights, powers, immunities, privileges and franchises of the said corporation, which may have been granted to or conferred thereon by statute or statutes, in force at the time of such sale and conveyance, and subject to all the restrictions imposed upon such corporation by any such act or acts, except so far as the same are modified hereby."

The act then required the persons for or on whose account the purchase was made to meet, within thirty days after the conveyance, at the county town of one of the counties in which the works were located, two weeks' notice of such meeting first being given by newspaper notice, and organize "said new corporation" by electing a president and six directors. At that meeting a corporate name and seal were required to be adopted, and the amount of the capital stock determined. Preferred stock is also authorized, as well as bonds not exceeding in amount the aggregate amount of stock. The new corporation was also required to

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file in the office of the secretary of state, within one month after organization, a certificate of the date of organization, the name adopted, the amount of stock and the name of the officers selected.

This statute of 1875 does not authorize the persons, in whose interest the purchase is made, to form themselves into a corporation. The act *ex proprio vigore* makes them a corporation, and requires them to effect an organization in the manner and within the time specified. Whatever legal title may pass by the conveyance, in form made to an individual purchaser or to individual purchasers, is clearly intended by the statute to be held by him or them, not for his or their individual use, but for the use of and to be used by the statutory creation. It seems entirely manifest that this act denies legislative sanction to the exercise of the franchises by an individual or individuals as such, and in effect forbids such use, and requires that any use of the franchises shall be exercised through the medium of the corporation created by the act and organized pursuant to the directions of the act.

It will be observed that the act last referred to does not include gas corporations. No legislation of this nature appears to have been adopted touching gas corporations until the act of February 17th, 1881. *P. L. 1881 p. 33; Gen. Stat. p. 3694 §§ 34, 35.* This act relates to sales made pursuant to a decree of court which include the "property, rights, powers, immunities, privileges and franchises of any turnpike, plank road, gas, water, or gas and water corporation." By language almost identical with the former act, it provides that

"the person or persons for or on whose account such property, rights, powers, immunities, privileges and franchises may be purchased shall be and they are hereby constituted a body politic and corporate, and shall be and they are vested with all the right, title, interest, property, possession, claim and demand, in law and equity, of, in and to such turnpike, bridge, plank road, gas, water, or gas and water company, with the appurtenances, and with the rights, powers, immunities, privileges and franchises of the corporation as whose the same may have been sold, and which may have been granted to or conferred thereupon by any law of this state in force at the time of such sale or conveyance."

The act then provides that the persons in whose interest the purchase was made,

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"may organize said new corporation by the election of such officers and directors, issue such certificates of stock, create and issue such preferred stock, and from time to time issue such bonds and secure the same as was authorized by the act or acts under and by which said former corporation was created."

The act then makes it the duty of the new corporation to file a certificate of the organization with the secretary of state within one month after the date of the organization. This provision touching the certificate is in almost the exact language of the similar provision of the act of 1875. It will be observed that the later act differs from the earlier in the matter of the organization of the new company in that the later act introduces the organization provision with the word "may" whereas "shall" is used in the earlier act. In the later act no time is named for the organization and no place for meeting is named and no notice to the meeting is required. The later act fixes the amount of the stock and bonds authorized as that authorized by the predecessor corporation, whereas in the former act these matters were to be determined by action of the organization meeting.

It is entirely clear that the general scope and purpose of the act of 1881 is the same as that of the act of 1875. It clearly withdraws whatever legislative sanction might have theretofore existed for the use, by an individual, of the sovereign prerogatives purchased under decrees of courts, and requires their use by a corporation which is created by the act and which it is intended that the purchasers of the franchises shall organize as an operative concern by the election of its officers pursuant to the act. It is possible that, in the absence of an adjudication of forfeiture, through *quo warranto*, long delay, upon the part of the person or persons holding the legal title to the franchises, in organizing the corporation pursuant to the act of 1881, will not operate to destroy the right to do so; but I am entirely clear that until this shall have been done any exercise of these franchises by an individual, or by a corporation not created by the act and organized in substantial compliance with the act, is without legislative sanction and is an unwarranted usurpation of power. If this be true, there can be no doubt of the power of this court to restrain such acts at the instance of the attorney-general. *Stockton v. Central Railway Co.*, 50 N. J. Eq. (5 Dick.) 52, 78.

2 Buch.McCarter v. Vineland Light and Power Co.

Farnum, who purchased at the receiver's sale in 1884, instead of associating with himself the requisite persons and organizing the corporation created by the act, conveyed the works and franchises to Halbrook, and Halbrook conveyed the works and leased the franchises to defendant corporation. Defendant is a corporation created by and organized under the General Corporation act, and can in no sense be considered or treated as the corporation created by the act of 1881 and organized pursuant to the requirements of that act. The construction which I have given to the act of 1881 as denying to the individual purchaser the right to operate under the franchises purchased operates in like manner to deny the right to defendant.

Acquiescence upon the part of the state in the operation of defendant's works is urged as a bar to the relief sought by the present information. If it should be assumed to be possible for the sovereign, by acquiescence in encroachments upon sovereign prerogatives, to be barred from the assertion of sovereign rights, such view could not properly be extended to the new or additional encroachments here sought to be restrained.

I am not unmindful of the duty of this court to withhold its extraordinary writ when rights are not clear, and especially when it is sought to restrain the progress of a public work upon a preliminary injunction. But the present record appears to disclose all the facts useful to the determination of the questions involved, and I consider it clear that informant is entitled to the relief sought.

A preliminary injunction will be advised.

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WILLIAM B. M. BURRELL

v.

MELBOURNE F. MIDDLETON and EMILY M. MIDDLETON.

[Submitted February 13th, 1907. Decided February 15th, 1907.]

1. A court of equity will not assume jurisdiction to try a controverted legal title to an easement of way, but when the substantive right which complainant seeks to enforce or protect consists of an equitable estate in lands, a court of equity has primary jurisdiction.

2. If A, for a valuable consideration, agrees to bestow upon B a right of passage over land of A, such agreement operates to vest in B an equitable estate in the land of A co-extensive with the terms of the agreement, and it is within the exclusive jurisdiction of a court of equity to enforce the execution of the agreement by decree of specific performance, and to protect B against the violation of the agreement until the agreement shall have been executed by the delivery of the necessary assurances of legal title.

3. The statute of frauds will not operate as a bar to the enforcement of a parol agreement for the sale of an interest in land if the agreement has been in part performed in such manner as to render it a fraud upon the vendee to permit the vendor to avail himself of the statute to avoid his agreement, but such parol agreements are not favored, and must be clearly proved.

4. Preliminary injunction refused because the rights of complainant were not clear.

On bill for injunction and relief.

The bill seeks to enjoin defendants from interfering with the use by complainant of the rear portion of defendants' lots. The use sought by complainant is the right to pass over the rear portion of defendants' lots with teams in order that complainant may have access to and from the rear of his own lot. The three lots in question are adjacent, one is owned by complainant, one by defendant Melbourne F. Middleton and the other by defendant Emily M. Middleton, the wife of Melbourne. To pass from the rear of complainant's lots to Markley place, it is necessary to cross the rear of the two lots owned, as stated, by defendants.

2 Buch.Burrell v. Middleton.

The right claimed by complainant is based upon a parol agreement, alleged to have been made by defendants with complainant when complainant purchased his lot. Complainant alleges that he purchased his lot of defendant Melbourne F. Middleton, believing that it, and the two adjacent lots now in controversy were owned by the wife of Melbourne, and alleges that both Melbourne and his wife agreed, at the time the sale was consummated in June, 1895, that if complainant would pay the price asked for the lot, they, defendants, would afford complainant a passageway across the rear of the two lots owned by them to enable complainant to conduct his business as undertaker on the rear of the lot he was purchasing. Complainant alleges that the privilege of passage across defendants' lots was one of the inducements of his purchase, and that, without that privilege, he would not have purchased at the price by him paid or at all. Complainant alleges that when title was made to him he ascertained that the lot he was purchasing was owned by Harriet M. King, a sister of Mrs. Middleton, and title was then taken from her, but that the agreement touching the passageway across the rear of defendants' lots was not embodied in the deed because, and only because, the grantor had no interest in the lots over which the way was to cross. Complainant has exercised the right claimed by him to cross the rear of defendants' lots from the year 1895 until shortly prior to the filing of the bill, at which time defendants denied to complainant the right. Complainant has made valuable improvements in connection with his business on the rear of his lot in reliance upon his right to cross defendants' lots. Defendants answer and deny having made the agreement claimed by complainant. Defendant Melbourne F. Middleton avers that he had no interest in the sale, but was making it for his wife's sister, and that no agreement touching a right of way entered into the consideration of the sale or purchase. Defendant Emily M. Middleton denies ever having made any agreement touching a way and denies ever having authorized her husband to do so for her. Defendant Melbourne states that at the time of the sale he stated to complainant's father that if complainant purchased the King lot defendants would have no serious objection to his crossing the back portion of the lots of defendants as long as defendants

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owned and occupied them. This statement or promise upon the part of defendant Melbourne is claimed by defendants to have been wholly voluntary upon his part and to have in no way entered into the terms or consideration of the sale.

The present application is for a preliminary injunction and has been heard on bill, answer and affidavits.

Mr. Edward A. Armstrong, for the complainant.

Mr. John W. Wescott, for the defendants.

LEAMING, V. C.

This court will not assume jurisdiction to try a controverted legal title to an easement of way. *Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507. But where the substantive right which complainant seeks to enforce or protect consists of an equitable estate in lands, this court has primary jurisdiction. The right which complainant here seeks to enforce is of the nature last stated. If defendants, for a valuable consideration, agreed to bestow upon complainant a right of passage over the land of defendants, that agreement operated to vest in complainant an equitable estate in the land of defendants co-extensive with the terms of the agreement, and it is within the exclusive jurisdiction of this court to enforce the execution of the agreement by decree of specific performance, and to protect complainant against the violation of the agreement until the agreement shall have been executed by the delivery of the necessary assurances of legal title. The statute of frauds will not operate as a bar to the enforcement of the parol agreement if the agreement has been in part performed in such manner as to render it a fraud upon the vendee to permit the vendor to avail himself of the statute to avoid his agreement. But such parol agreements are not favored and must be clearly proved. *Vreeland v. Vreeland*, 53 N. J. Eq. (8 Dick.) 387. I am unable, in view of the denials contained in the answer and the scope of the affidavits filed by the defendants, to regard the rights of complainant as established with that clearness which is necessary to warrant the issuance of a preliminary injunction. It may also be observed that a denial of the preliminary writ will

2 Buch.Smith v. Smith.

not, in this case, occasion irreparable injury to complainant. Should defendants hereafter deny to complainant the use of the way and complainant's right be established at final hearing, such damages as complainant may suffer in the interim may be easily measured and recovered at law.

The order to show cause will be discharged, with costs.

ANNA MILLER SMITH

v.

DANIEL SMITH et al.

[Decided February 15th, 1907.]

Under *Gen. Stat. p. 1938 § 1*, providing that where no time is fixed by a will within which legacies are to be paid, the executors have one year after probate in which to make payment, where an order of the orphans court admitting a will to probate was suspended by appeals, the executor had one year from the day certified copies of the decrees of the appellate courts were filed with the surrogate and probate adjudged by him within which to pay the legacies.

On petition for payment of legacy.

Mr. Townsend Godfrey, for the petitioner.

Messrs. Gaskill & Gaskill, for the respondents.

LEAMING, V. C.

I entertain the view that the executors of the estate of Philip M. Wheaton, deceased, have one year, from May 16th, 1906, in which to pay legacies.

The order made by the orphans court, June 8th, 1904, admitting the will to probate, was suspended by the appeals to the pre-

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rogative court and the court of errors and appeals. *Brown v. Ryder*, 42 N. J. Eq. (15 Stew.) 356. Operative probate was not effected until the termination of these appeals. May 16th, 1906, certified copies of the decrees of the appellate courts were filed with the surrogate of Cape May county, and probate was on that date adjudged by the surrogate upon proofs made before him by the subscribing witnesses to the will, and letters were then issued. Under *Gen. Stat. p. 1938 § 1*, the executors are entitled to one year from that date in which to make payment of legacies, where no time is fixed by the will within which such legacies are to be paid. Should the inoperative order of probate made by the orphans court be held to be the probate contemplated by this statute, these executors would have been subjected to actions for all legacies the day after their appointment.

The prayer of the petition must be denied. The petition will be held until the expiration of the year, when the application may be renewed.

No costs will be taxed.

PHEBE H. HIBBERT

v.

ROBERT J. HIBBERT.

[Submitted February 5th, 1907. Decided February 21st, 1907.]

1. Where the domicile of matrimony is in a certain state, and the husband deserts the wife, the domicile of the wife continues in that state until she has acquired one elsewhere.

2. The law will not presume the place of birth as a domicile, based upon the abandonment of the last domicile, without the intention of adopting a new one, unless the evidence clearly establishes the facts on which that presumption is based.

3. In an action for divorce, evidence held not to show an abandonment by the complainant of the domicile of matrimony.

2 Buch.Hibbert v. Hibbert.

On bill for divorce for desertion. On exceptions to report of master advising against a decree of divorce.

Mr. Ulysses G. Styron, for the exceptant.

LEAMING, V. C.

The sole question for determination is one of jurisdiction. Complainant was deserted by her husband, in Atlantic City, more than two years prior to the filing of the bill. They had resided there continuously since their marriage. The desertion is fully established by the evidence. The only question for consideration is whether or not complainant maintained her domicile at Atlantic City during the period between the desertion and the filing of the bill. The doubt cast upon that question arises from the fact that during the period named complainant, being without means, was obliged to accept employment which necessitated her absence from this state during almost the entire time. Soon after the desertion she sold most of her household goods and stored the remainder with a friend in Atlantic City, and accepted employment as demonstrator. At that time it was entirely manifest that the desertion of her husband was a finality with no reasonable hope of his return. Complainant's duties as demonstrator were almost wholly out of this state and were chiefly in Philadelphia, New York, Washington, Albany, Troy and other large cities, at which points she would demonstrate for her employers. While demonstrating in New York, Brooklyn and Troy she spent much of her time with her married daughter in Easton, New York. She seldom returned to Atlantic City, but when there boarded with the friend with whom her goods were stored.

The domicile of matrimony having been in Atlantic City, and the husband having there abandoned complainant to avoid his matrimonial obligations, the domicile of complainant continued in Atlantic City and is still there, unless a new domicile has been acquired by her elsewhere. *Haddock v. Haddock*, 201 U. S. 562, 570; *Watkinson v. Watkinson*, 68 N. J. Eq. (2 Robb.) 632, 638. The testimony clearly discloses that complainant has not acquired a new domicile *animo et facto*. Since her first departure from

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Atlantic City she has not made for herself the semblance of a home elsewhere, and it is manifest that she has at no time entertained any fixed purpose to do so. The utmost that can be said adverse to her continued domicile at Atlantic City is that she may not have retained a fixed purpose to return there permanently. I think a fair deduction from the testimony is that during most of the period of her absence from Atlantic City she did not know whether it would ever be possible for her to return to that city permanently, but that she wished to do so and only remained away from necessity. Had she definitely abandoned the hope or expectation of returning to Atlantic City as her home and continued a wanderer with no new domicile adopted by her either in fact or intent, then her domicile of origin, which was Delaware, might have become her legal domicile. *Valentine v. Valentine*, 61 N. J. Eq. (16 Dick.) 400, 406. But the testimony will not support that view. Before the law will artificially establish the place of birth as a domicile, based upon the abandonment of the last domicile without the intentional adoption of a new one, the evidence should clearly establish the facts on which that unusual presumption is based. I do not think that the conclusion can be properly drawn from the evidence that complainant has, at any time, abandoned her Atlantic City domicile.

I will advise a decree in accordance with the prayer of the bill.

CHARLES W. MAXWELL et al.

v.

CHARLES LEICHTMAN et al.

[Submitted February 11th, 1907. Decided February 21st, 1907.]

The right to file a bill of interpleader is not lost by filing pleas in bar in actions brought at law, unless the defence at law is persisted in until verdict.

2 Buch.Maxwell v. Leichtman.

On bill of interpleader. Hearing on return of order to show cause for injunction pursuant to prayer of bill of interpleader.

Mr. Harry Wootton, for the complainants.

Messrs. Thompson & Cole, for the defendant Leichtman.

LEAMING, V. C.

I am convinced that complainants are entitled to a preliminary injunction as prayed.

It is not clear that complainants may not have imperiled their right to full relief by filing pleas in the actions at law before applying to this court for relief, but I am unable to find authority or satisfactory reason for the claim that by so doing they have destroyed their right to maintain the present bill. The rule that to entitle a party to relief by bill of interpleader he must apply before verdict or judgment at law appears to be well recognized and almost uniformly enforced. See *Cornish v. Tanner*, 1 *Younge & J.* 333; *Holmes v. Clark*, 46 *Vt.* 22; *Danaher v. Prentiss*, 22 *Wis.* 311; *Haseltine v. Brickey*, 16 *Gratt.* 116; *Yarborough v. Thompson*, 3 *Sm. & M.* 291. But where the effect of the verdict is merely to settle the *quantum* of damages the rule referred to is not uniformly applied. See *Hamilton v. Marks*, 5 *De G. & S.* 638, criticised in *Danaher v. Prentiss*, *supra*. I find no authority, however, which gives sanction to the view that the right to file a bill of interpleader is lost by the act of filing pleas in bar in the actions brought against one at law, unless the defence at law is persisted in until verdict. In *Jacobson v. Blackhurst*, 2 *Johns. & H.* 486, complainant's bill was entertained, under the circumstances named, but terms were imposed including the withdrawal of the plea at law and the payment of costs at law and also in equity up to the time of the withdrawal of the plea. See, also, *Jew v. Wood*, 3 *Beav.* 579. To at this time determine the right to costs, however, would be beyond the scope of the issues now presented.

The delivery to complainants of the indemnity bond cannot be held to bar complainants' right to relief under their bill of

interpleader. 2 *Dan. Ch. Pl. & Pr.* 1566. The affidavits filed do not justify the conclusion that the delivery of the indemnity bond referred to operated to establish a contractual relation between the parties.

The claims of the respective defendants are not independent claims without privity or derivation from a common source. Even in the more strict cases of bailees, agents and tenants the contractual relation with the bailor, principal or landlord will not operate as a bar to a bill of interpleader when the opposing claim is derivative under that of the bailor, principal or landlord. 4 *Pom. Eq. Jur.* § 1327. In the present case the claim of defendant Clayton is based upon the original right of defendant Leichtman, and emanates from failure of the latter to sue within six months.

The order to show cause will be made absolute.

THOMAS S. WILLS and SARAH WILLS

v.

ELIZA A. WILLS, ELIZA A. WILLS, executrix.

[Submitted February 18th, 1907. Decided February 22d, 1907.]

1. Where lands are devised in the first instance in language indeterminate as to the quality of the estate, from which an estate for life would result by implication, and words adapted to the creation of a power of disposal, without reservation as to mode of execution, are added, the will vests in the devisee an estate in fee.

2. A power given to a devisee to sell when in her judgment a sale is necessary for her comfort and convenience, is a power without limitation within the rule that where lands are devised in the first instance by language indeterminate as to the quality of the estate, and words adapted to the creation of a power of disposal, without reservation, are added, the will vests in the devisee an estate in fee.

3. While force should be given to the intention of the testator, his intention must be gathered by the application of the known rules of construction and interpretation.

2 Buch.Wills v. Wills.

On motion to strike out bill.

Messrs. Berry & Riggins, for the complainants.

Mr. Ephraim Tomlinson and *Mr. Howard M. Cooper*, for the defendants.

LEAMING, V. C.

I entertain the view that the provisions of the will in question fall within the defined rule of construction that where lands are devised in the first instance in language indeterminate as to the quantity of the estate from which an estate for life would result by implication, and words adapted to the creation of a power of disposal, without reservation as to mode of execution, are added, the construction will be that an estate in fee is given. I am unable to find in the power of sale contained in the fifth paragraph of the will any limitation upon the power of disposition sufficient to remove it from the operation of this rule. The power of sale named in the will is, as I understand the force of the language used, the power to sell, when, in the judgment of the devisee, a sale is necessary for her comfort or convenience. The testator apparently sought to make the judgment of the devisee the sole criterion for the exercise of the power. No power could do more. Had the power of sale been limited to conditions where a necessity should exist to provide funds for the support of the devisee, the views expressed by Vice-Chancellor Pitney in *Cox v. Wills*, 49 N. J. Eq. (4 Dick.) 130, and *Bradway v. Holmes*, 50 N. J. Eq. (5 Dick.) 311, might apply. But here the devisee's power of sale is based upon her own judgment as to her own convenience. I deem such a power practically without limitation. I am convinced that the provisions over must fail. While full force should be given to the intent of the testator, yet that intent must be gathered by the application of the known rules of construction and interpretation established by oft-repeated and long-standing adjudication. *Tuerk v. Schueler*, 71 N. J. Law (42 Vr.) 331, 333.

I will advise an order striking out the bill.

Cresse v. Loper.

72 Eq.

WALTER CRESSE

v.

JOHN B. LOPER.

[Submitted March 4th, 1907. Decided March 4th, 1907.]

The rule that if a trustee, or one standing in a similar capacity, becomes a purchaser of the trust property, such act is voidable at the instance of the person whom he represents, applies to a sale of partnership property by a master, pursuant to a decree in partition, and where the same is purchased by one of the partners the other partner may avoid the sale.

On bill, answer, replication and proofs.

The bill is filed by complainant to procure an accounting from defendant as a partner, and also to have defendant declared to hold the title to certain real estate in trust for the partnership. Complainant and defendant were engaged in the meat and vegetable business at Holly Beach, New Jersey, as partners. In March, 1903, complainant was adjudged insane and committed to an institution for the insane, where he remained until October, 1905, at which time he was discharged as cured. During the period of incapacity of complainant defendant continued to conduct the partnership business. Among the assets of the partnership was certain real estate which had been purchased by the partners with partnership funds and title taken in the names of the partners as tenants in common. In December, 1903, defendant filed a bill for partition of the real estate so owned by the partnership, and in April, 1904, pursuant to decree in the partition cause, public sale of the real estate was made by a special master. At that sale defendant became the purchaser as the highest bidder. In the final decree in partition the parties were not expressly authorized to purchase at the sale. Complainant now seeks an accounting from defendant, as partner, for the

2 Buch.Cresse v. Loper.

period during which complainant was confined, and also seeks to have defendant decreed to hold the title to the real estate, which he purchased at the master's sale, as trustee for the partnership. The testimony at the trial established that the real estate, at the time of the sale, was worth at least \$2,300. The amount for which the property was sold to defendant at the sale was \$1,430. Defendant admits his liability to account, but asserts absolute title to the real estate purchased by him at the master's sale.

Mr. James M. E. Hildreth, for the complainant.

Messrs. Douglass & Douglass, for the defendant.

LEAMING, V. C.

Since the case of *Staats v. Bergen*, 17 N. J. Eq. (2 C. E. Gr.) 554, it has been the recognized policy of the law of this state that if a trustee, or one standing in any similar capacity, becomes the purchaser of the trust property, such act is voidable at the instance of the person whom he represents. The rule is adopted as a wise and necessary public regulation, and is applied to judicial sales as well as to sales made by the fiduciary agent. *Carson v. Marshall*, 37 N. J. Eq. (10 Stew.) 213, 215; *S. C.*, 38 N. J. Eq. (11 Stew.) 250, 255; *Romaine v. Hendrickson's Executors*, 27 N. J. Eq. (12 C. E. Gr.) 162; *Creveling v. Fritts*, 34 N. J. Eq. (7 Stew.) 134; *Porter v. Woodruff*, 36 N. J. Eq. (9 Stew.) 174; *Deegan v. Capner*, 62 N. J. Eq. (17 Stew.) 339.

It is not, in my opinion, essential to the application of the rule that the purchaser be a trustee in the strict sense. A trustee is forbidden to purchase because his interest, as a purchaser, is opposed to the interest of his *cestui que trust*. The philosophy of the rule extends its application to all cases where it is the legal duty of the purchaser to cause the property to be sold for its full value. In the present case the property sold was that of the partnership. Defendant, as a partner, owed a legal duty to the partnership and to his absent partner to cause the partnership asset to be sold at its full value. As a purchaser it was to his personal advantage to buy the property as cheaply as pos-

sible. The duty which defendant was under legal obligation to perform in reference to the sale of the property was clearly inconsistent with his interests as a purchaser. Partnership relations are usually defined and measured by the principles of agency, but to the same extent that the powers of partners are thus defined, corresponding resulting duties arise which carry the essential elements of trust relationship, and the same rules and tests are necessarily applicable to the conduct of partners, with reference to the partnership assets, as are ordinarily applicable to that of trustees. It is in this view that I understand *Partridge v. Wells*, 30 N. J. Eq. (3 Stew.) 176, 178, in which Vice-Chancellor Van Fleet gives expression to the idea that partners hold to each other the relations of trustee and *cestui que trust*. S. C., affirmed 31 N. J. Eq. (4 Stew.) 362. See, also, *Pomeroy v. Benton*, 57 Mo. 531, 545; *Kelley v. Greenleaf*, 3 Story (U. S.) 93, 100; *Goldsmith v. Eichold Brothers*, 94 Ala. 116. In the present case the principles of trusteeships are peculiarly applicable by reason of the circumstance of the insanity of complainant at the time of the sale. Insanity of one of the partners does not, *per se*, work a dissolution of the partnership. The remaining partner may, in such case, assume the whole management of the partnership business, or may institute proceedings for dissolution. The former course was adopted by defendant. In the adoption of that course his fiduciary relationship clearly embodied all the essential elements of a trusteeship. *Raymond v. Vaughn*, 128 Ill. 256. I am of the opinion that in purchasing the property in question defendant subjected himself to the operation of the rule in *Staats v. Bergen*, *supra*.

The propriety of extending the operation of this rule to judicial sales of partnership assets is well exemplified by the facts of this case. The property was sold for scarcely more than one-half of its value. The uncle of complainant testified that he was induced not to bid at the sale by a promise upon the part of defendant that, if he would not "bid on the property and run it up" defendant would see that complainant got all that was coming to him. While this is denied by defendant it is clear from the testimony that the uncle was deterred from bidding by reason of what he understood to be a promise of this nature.

2 Buch. Woodbine Land and Improvement Co. v. Riener.

I will advise a decree that defendant holds the title to the land in question in trust for the partnership, and that the special master already appointed make public sale of the real estate. In the accounting before the master all just allowances will be made to defendant.

WOODBINE LAND AND IMPROVEMENT COMPANY

v.

ISAAC RIENER et al.

[Submitted March 11th, 1907. Decided March 13th, 1907.]

All deeds of lots sold by complainant in a settlement established by it contained a covenant that no liquor should be sold on the granted premises except on consent executed with the formalities of a deed.—*Held*, that though liquor has been sold on the tract for a number of years in violation of law and the covenant, and a wholesale liquor license has been issued for three years authorizing sale in a building on the tract, yet, complainant having at no time given even tacit sanction to violation of the covenant, but all sales having been against its honest efforts to prevent such violation, and the delay in filing bill to enforce the covenant having been due to hope that the sale could be otherwise stopped, there has been no waiver of right to enforce the covenant.

On bill, answer, replication and proofs.

Complainant seeks to enforce a restrictive covenant contained in a deed made by complainant of lands now owned by defendant Jennie Riener.

In the year 1891 complainant purchased some five thousand acres of land in Cape May county for the purpose of establishing thereon a settlement of Hebrews. The enterprise was for the benefit of the Hebrew race and not for profit, and was conducted by money forming a trust fund left by Baron Hirst for that purpose. The tract was divided into building lots for residences

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and into garden lots, which were to remain open, and these lots were for sale to Hebrews. The general plan included the adoption of certain covenants to be inserted in all deeds, and among these was a covenant against the sale of intoxicating liquors, as follows:

"Also, that no spirituous, malt, intoxicating or vinous liquors, preparations or substances in the nature thereof, shall be manufactured, bought, sold or kept for sale as a beverage upon the premises above granted without the written consent first had and obtained of the party of the first part, duly executed and proven under its common or corporate seal, in the same manner that conveyances of land are properly executed and proven in the State of New Jersey."

Over two hundred and fifty conveyances have been made by complainant and each conveyance contains the above covenant, as well as other uniform restrictive covenants. At this time over two thousand people reside on the tract. The lot known as No. 22, block No. 1, in section D, was conveyed by complainant March 4th, 1897, to Emma Pesselnik, and by sundry conveyances the title became vested in defendant Jennie Riener. Defendant Reuben Riener now occupies the lot in question. The bill alleges that defendants are now engaged in the business of selling intoxicating liquors on the lot named in violation of the terms of the covenant above quoted, and seeks the enforcement of the covenant by process of injunction.

The answer admits the violation of the covenant and justifies under the claim that complainant has waived its right to enforce the covenant by permitting violations of the same covenant by other grantees, and also by permitting the violation of other uniform covenants contained in the deeds made by complainant.

Messrs. Coult, Howell & Smith, for the complainant.

Mr. James M. E. Hildreth, for the defendants.

LEAMING, V. C.

The courts of this state have so frequently given consideration to the enforcement of covenants of this nature that the law con-

2 Buch. Woodbine Land and Improvement Co. v. Riener.

trolling questions of this class may be said to be fully defined. Complainant is clearly entitled to the relief sought unless it has by its conduct lost its right to the aid of this court. As restrictive covenants in deeds are for the purpose of preserving designed conditions, it necessarily follows that when one who is entitled to enforce them fails to do so, he is liable to be deemed to have acquiesced in the violation and abandoned the scheme originally intended. If the failure to enforce the covenant has induced physical changes permanently destructive of the harmony of the original scheme designed to be preserved by the covenant, it is manifest that an abandonment must be assumed; but where no substantial change in the conditions sought to be preserved by the covenant has been brought about by the failure to enforce, no good reason appears to exist for treating the failure to enforce as a bar, unless the circumstances of the case clearly disclose acquiescence to a degree manifesting the absence of an intention to preserve the original conditions. In *Ocean City Association v. Chalfant*, 65 N. J. Eq. (20 Dick.) 156, 158, Vice-Chancellor Reed said: "It is only when the person in whom the right to enforce the covenant resides has permitted such infringement of its provisions as results in alterations that cannot be corrected, or which it is manifest there is no intention to have corrected, that he is precluded from further enforcing the covenant." It has frequently been held that acquiescence may operate as a waiver of the right to enforce covenants respecting the use of the property for certain occupations, without any physical changes of a permanent nature having occurred in the property, but in all such cases it will, I think, be found that such substantial changes have been permitted in the special conditions sought to be preserved by the covenant as to clearly indicate an intention upon the part of the person entitled to enforce the covenant to relinquish the original purpose or scheme defined by the covenant, or that adverse equities have intervened by reason of the failure to enforce the covenant.

In the present case I am unable to find any acquiescence upon the part of complainant amounting to a waiver of its right to enforce the covenant in question. Liquor has undoubtedly been sold upon the tract in violation of the covenant and in violation

of law for a number of years prior to the filing of the bill, but the evidence satisfies me that complainant has persistently combated the practice in the hope of wholly preventing it without the necessity of an appeal to this court. In every case of illicit sales brought to the knowledge of complainant indictments have been procured at its instance or attempts have been made by complainant to procure indictments. In September, 1903, a wholesale liquor license was granted to Simon Pesselnik by the court of common pleas of Cape May county authorizing him to sell liquor in a building on this tract. In September, 1904, a similar license was granted to Isaac Raynor. In September, 1905, a similar license was again granted to Isaac Raynor. The bill was filed in November, 1905. Prior to this complainant had earnestly endeavored to prevent these licenses by moral influences, and when satisfied that it could not be accomplished in this way the bill in this case was promptly filed. I am entirely satisfied that complainant has at no time given even tacit sanction to the violation of this covenant, and that such violations as have occurred have not only been against the will of complainant but against the honest efforts upon the part of complainant to prevent the sale of liquor on the tract in violation of the covenant, and that the only cause of delay in filing the bill was the hope that the covenant could be controlled by complainant by moral influences and the necessity of filing the bill thus obviated. Under these circumstances there can be no acquiescence in the essential elements of that term, and no adverse equities appear to have arisen by reason of the delay in filing the bill.

Violation of other uniform covenants of the deeds of complainant were also urged as a defence. The testimony was admitted at the hearing, but I deem it irrelevant. The other covenants referred to have no relation to the liquor covenant now in question.

I will advise a decree in accordance with the prayer of the bill.

2 Buch.Voorhees v. Nixon.

HARRISON H. VOORHEES, receiver, &c.,

v.

HORACE F. NIXON et al.

[Submitted March 13th, 1907. Decided March 15th, 1907.]

1. In a suit by the receiver of a corporation to set aside a mortgage given by the corporation in part payment for land sold to it by the wife of the president, it appeared that the wife purchased the land for \$450 and sold it to the corporation for \$3,000; that the president was the moving spirit in the organization of the corporation, and that but three of the five directors were present at a meeting at which the resolution for the purchase was passed, and that at such meeting the wife was elected secretary; that no notice of the first meeting of the directors was given and no waiver of notice executed. It was shown that when an application was made for the appointment of a receiver of the corporation, the wife pledged the mortgage to raise money to contest the receivership, and that thereafter she sold it and applied part of the proceeds to the husband's uses.—*Held*, that the facts warranted an abatement of the mortgage, except as to the amount which the wife had paid for the land.

2. In a suit by the receiver of a corporation to set aside a mortgage given by it to the wife of an officer, it appearing that practically all of the stockholders had been ignorant of the facts on which the right to relief was based, and that they had been deceived by the officer in question, no laches could be imputed.

3. The assignee of a mortgage securing a bond takes it subject to all defences to the bond, whether with or without notice, as the mortgage is a mere incident of the debt.

4. Where a corporation executed a mortgage to the wife of the president in part payment for land sold to the corporation by her, and thereafter the corporation was restrained from transferring any of its property rights, which was known to one who purchased the mortgage, and without any action of the board of directors authorizing it, the president and his wife, as secretary of the corporation, executed in the name of the corporation, at the instance of the purchaser, a declaration against offsets, such instrument was no bar to the assertion by the corporation's receiver of defences against the mortgage, on the ground that the execution thereof arose from a violation of a fiduciary relation.

On final hearing on pleadings and proofs.

The bill is filed by the receiver of the Ocean Crest Hotel Company, an insolvent corporation, to test the validity of a mortgage which was given by that corporation in part payment for land sold to the corporation by defendant Mrs. Lillie M. Malott. Horace F. Nixon is made a defendant as the present holder of the mortgage. The land in question was conveyed to the corporation by Mrs. Malott, pursuant to an agreement for that purpose made at the organization meeting of the corporation for the price of \$3,000, of which \$1,000 was paid in stock of the corporation at par and \$2,000 by the execution of the mortgage now in question on the land conveyed. Mrs. Malott was secretary of the corporation and H. J. Malott, her husband, was president and a director. The theory of complainant's suit is that the fiduciary relations which existed between the Malotts and the corporation rendered the contract violative of the established principles controlling trusteeships, and that the contract should be set aside to the extent of charging against the mortgage the difference between the amount which Mrs. Malott paid for the property and the amount for which she sold the property to the corporation.

Mr. Lewis Starr, for the complainant.

Mr. James B. Nixon, for the defendants.

LEAMING, V. C.

It must be regarded as the settled policy of the law of this state that express contracts between a corporation and one of its directors are voidable at the instance of the corporation. When the transaction is one in which there arises by operation of law obligations co-extensive with the contract, as would be the case in the loan of money by a director to his corporation, it is manifest that no reasonable objection can be found to the transaction, but where the right must find its support in the convention it will not be sustained as a right. The underlying reason for the rule is that it is the duty of a director to represent the interests of his corporation, and that duty cannot be impartially performed when he contracts with it in his own behalf. I under-

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stand this to be the rule as defined by the court of errors and appeals in *Stewart v. Lehigh Valley Railroad Co.*, 38 N. J. Law (9 Vr.) 505, 522. There are cases which hold that where the transaction is fair and open the contract may be supported, but such cases, when applied to contracts between a director and his corporation, are clearly in conflict with the principles of the case above cited. When the contract has been executed and the parties cannot be restored to their original position, I take it to be the duty of a court of equity to decree such relief as will place the parties as nearly as possible in the position where they stood at the time the voidable contract was made.

The contract of sale in this case, however, was made between the corporation and Mrs. Malott, who was not a director, but was the wife of a director. I entertain the view that the policy which forbids a contract between a corporation and its director necessarily includes a director's wife. A trustee, or an agent to sell lands, could not properly be permitted to make sale of the trust property to his wife. Irrespective of the husband's interest in his wife's property, present or prospective, his interests in her welfare would, in such cases, necessarily interfere with an impartial exercise of his duties to his trust. A contract made by a trustee to purchase lands owned by his wife would, in like manner, operate as a strain upon his duties to his trusteeship. See *Reed v. Aubrey*, 91 Ga. 435, and cases there collected. If, therefore, a contract between a corporation and its director is to be deemed voidable, a like contract between a corporation and the wife of a director should stand upon the same plane. I entertain the view that the contract of sale from Mrs. Malott to the corporation was, on these grounds, voidable at the option of the corporation.

I reach this conclusion with perhaps greater freedom than I should otherwise exercise by reason of the fact that other considerations in this case lead me to the same result. October 7th, 1905, Mrs. Malott contracted with a land company for the purchase of the two lots which were afterwards sold by her to complainant corporation. By her contract of purchase she took the lots at a valuation of \$450 per lot, but a clause in the agreement made the entire purchase price \$150 in case she built on the

property purchased, pursuant to the agreement, by September 1st, 1906. The \$450 payment was completed by her October 25th, 1905. Complainant corporation was formed in December, 1905, for the purpose of acquiring these lots and erecting thereon a hotel. In the formation of the corporation Mr. Malott was the moving spirit. He associated with him four incorporators and filed the certificate of incorporation with the secretary of state, December 13th, 1905. Of the \$1,000 capital stock with which the company was to commence business Mr. Malott subscribed for \$500. He prepared minutes for the incorporators' organization meeting and for the first directors' meeting in advance of the meetings, and submitted them to his co-incorporators in Philadelphia. The following day, December 21st, 1905, three of the five incorporators met in New Jersey and adopted these minutes as already prepared. These minutes of the organization meeting included the adoption of a set of by-laws, the election of the five incorporators as directors and the passage of a resolution for the purchase of the lots in question for \$3,000, payable as already stated. The minutes of the first directors' meeting, prepared in advance, were also adopted. These minutes included the election of Mr. Malott as president of the board and Mrs. Malott as secretary, and also the approval of the resolution for the purchase of the lots from Mrs. Malott. While the minutes recite that the five directors were present, only three were, in fact, present. No notice of this first meeting of the board of directors was given and no waiver of notice was signed. From the testimony it is apparent that Mr. Malott was the dominating factor throughout. I am entirely satisfied that no proceedings touching the purchase of these lots can be properly said to have been a genuine exercise of a discretion upon the part of a board of directors of the corporation. The proceedings were conceived and carried into execution by Mr. Malott with a free hand, and do not, in my opinion, in any proper sense represent the deliberative exercise of an intelligent or independent judgment of a board of directors. Whether the members of the board, other than Mr. Malott, knew that the lots for which they were paying \$3,000 had cost but \$450 does not appear, but one member of the board testified that the matter was not mentioned. All this

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may be unimportant if it be assumed, as a fact, that Mrs. Malott was dealing with the corporation as an independent principal touching her own property, and that, as the wife of a director, she was privileged to do so, but I am not prepared to find as a fact that, as between Mr. and Mrs. Malott, this property was purchased by her from the land company in her own interest. When she made the contract of purchase of these lots and agreed to pay \$450 for them and to erect a building upon them costing not less than \$2,000, her sole resources were \$508.03 which she had in a bank. When an application was made for the appointment of a receiver of complainant corporation she pledged the mortgage now in question to raise \$300 to enable Mr. Malott to contest the receivership. Later she sold the mortgage and applied part of the proceeds of sale to Mr. Malott's uses. I incline to the view that, as between them, the contract of purchase of these lots was probably in his interest as much as in hers, and that she cannot properly be treated as having been an independent owner of the lots at the time of the sale to complainant corporation. I find it impossible to view the transaction other than as one essentially between Mr. Malott and his corporation, and as one in which no independent judgment of a board of directors has been exercised.

It is urged that the corporation has not promptly asserted its rights to avoid the contract. The testimony discloses that much if not all of the capital which came into the corporation by the sale of stock to new stockholders after the organization meeting was procured through misrepresentations of fact by Mr. and Mrs. Malott touching this very transaction. These new stockholders have testified that both Mr. and Mrs. Malott represented to them that Mrs. Malott had sold five instead of two lots to the corporation, and that they remained under that belief until the contrary was disclosed by a search of title made after the insolvency of the corporation. The bill in this case was originally filed under the claim that Mrs. Malott had in fact contracted to sell five instead of two lots, and had failed to convey the remaining three. Both Mr. and Mrs. Malott deny having made these representations, but the evidence is strongly against them as to that fact. Under these circumstances it is manifest that no

laches can be imputed, for practically all of the stockholders who were entitled to relief were ignorant of the facts.

The contract of sale having been subsequently executed by a conveyance to the corporation, and a hotel having been built on the property, the parties cannot now be placed in their original positions. It becomes necessary, therefore, to restore to Mrs. Malott what she is rightfully entitled to. She paid for the contract of purchase which she sold to the company \$450. It is claimed that when she sold it to the company it had greatly enhanced in value by reason of certain developments in the land company enterprise. The claim that it increased in value from \$450 to \$3,000 in less than three months cannot be seriously entertained. It may have increased in value in some degree, but I cannot conclude that its enhancement in value during that time was of such substantial amount that Mrs. Malott can at this time, under the circumstances of this case, become equitably entitled to more than the amount which the contract cost her, with interest on that amount.

It remains to be considered whether defendant Nixon, as present owner of the mortgage, enjoys rights superior to those which would be extended to Mrs. Malott as owner of the mortgage. The mortgage was assigned to defendant Nixon as security for a fee of \$300 for defending the application for a receiver of complainant corporation. Later, and after Mr. Nixon had been informed that defences existed to this mortgage, he purchased it absolutely at a valuation of fifty per cent. of its face value, paying for it \$700, in addition to the \$300 owing to him as a fee. Even as an innocent purchaser of a negotiable instrument he could not, under these circumstances, claim protection beyond the \$300 originally loaned. But the assignee of a mortgage securing a bond takes it subject to all defences to the bond, whether with or without notice. "The mortgage is a mere incident of the debt which it is intended to secure, and a defence to the debt is a defence to the mortgage." *Magie v. Reynolds*, 51 N. J. Eq. (6 Dick.) 113, 117. Before making the loan of \$300 on the mortgage defendant Nixon procured a declaration against offsets executed in the name of complainant corporation, and this is urged as an estoppel against complainant. This declaration

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against offsets was executed by Mr. Malott as president and Mrs. Malott as secretary of the corporation without any action of the board of directors authorizing it, and at a time when the corporation was under restraint, by order of this court, from transferring any of its property rights, and Mr. Nixon at that time knew of that restraint. It is clear that this instrument cannot be treated as a bar to the assertion of any defences which complainant corporation at that time had against the mortgage.

The receiver of the corporation urges that the entire abatement from the contract price should be charged against the mortgage. I cannot accede to that view. I think the \$450 and interest, which is to be restored, should be allowed to stand as due on the mortgage, and that the decree should adjudge that amount as due on the mortgage, and no more. I will so advise.

PHINEAS B. MARR

v.

WILLIAM B. MARR and BEACON LAND COMPANY.

[Submitted March 15th, 1907. Decided March 22d, 1907.]

1. A director of a corporation may purchase the corporation property sold under an execution on a judgment obtained by him against the corporation, and the sale will not be set aside because of his trust relationship, unless some undue advantage has been secured by reason of that position.

2. In an action by a stockholder of a corporation to set aside a sale of the corporate property under an execution on a judgment obtained by a director against the corporation to the director, the fact that notice of the sale, other than the statutory notice, was not given to all the stockholders was insufficient to show that the director had taken any undue advantage.

The bill is filed by complainant, as a stockholder of Beacon Land Company, in behalf of himself and other stockholders, to

set aside a sale made by the sheriff of Ocean county to defendant William A. Marr under an execution issued on a judgment held by defendant Marr against the land company. The land company having ceased the transaction of business, and having no organized board of directors, complainant seeks to enforce such rights as could have been appropriately enforced at the instance of the company in behalf of its stockholders.

In the year 1898 the Beacon Land Company was indebted to defendant Marr for money which he had prior to that time loaned to it. On failure of the company to make payment, defendant Marr brought suit and recovered judgment. On an execution issued on that judgment the sheriff of Ocean county made sale of the hotel property now in question, known as "Beacon-by-the-Sea." The property consisted of the hotel lots, buildings and furniture, and comprised all of the property of the land company. At the sale the property was purchased by defendant Marr, as plaintiff in execution. At that time defendant Marr was president and a director of the land company. The theory of complainant's suit is that by reason of the trust relationship at that time existing between the land company and defendant Marr, as its president and one of its directors, the title which he received by that purchase will be decreed to be held by him in trust for the benefit of the stockholders of the land company and an accounting ordered. Final hearing has been had on bill, answer of defendant Marr, replication and proofs.

Messrs. Bleakly & Stockwell, for the complainant.

Mr. Thomas B. Hall, for the defendant Marr.

LEAMING, V. C.

It is a general principle of equity, firmly established and frequently applied in this court, that if a trustee becomes the purchaser of the trust property, such act is voidable at the instance of the *cestui que trust*. The rule is adopted from wise considerations of public policy with a view to remove from transactions

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by trust agents the danger attendant upon the existence of personal interests inconsistent with trust duties. In *Staats v. Bergen*, 17 N. J. Eq. (2 C. E. Gr.) 554, 559, the learned chief-justice, speaking for the court of errors and appeals, said:

"I think, upon correct principle, a trustee, in no case, nor in any crisis, can become the purchaser of property when the fact of his making such purchase has a tendency to promote his own interest at the expense of his *cestui que trust*. This, it is conceived, is the groundwork of the decisions in England and in this country."

The rule has been uniformly applied in this state to purchases by a trustee at public sales, and also at judicial sales, to the same extent as to sales made by the trustee in cases where the purchaser has a duty to perform in reference to the sale inconsistent with the character of a purchaser. *Staats v. Bergen*, *supra*; *Marshall v. Carson*, 38 N. J. Eq. (11 Stew.) 250; *Romaine v. Hendrickson's Executor*, 27 N. J. Eq. (12 C. E. Gr.) 162; *Creveling v. Fritts*, 34 N. J. Eq. (7 Stew.) 134; *Porter v. Woodruff*, 36 N. J. Eq. (9 Stew.) 174; *Deegan v. Capner*, 44 N. J. Eq. (17 Stew.) 339.

A director of a corporation is not a trustee in the strict sense. The title to the corporate property is in the corporation. But the duties which a director is required to perform for the corporation which he represents are in many respects similar to the duties of a trustee, and his relation to the corporation is, in general, essentially that of a trustee. He is not, in consequence, allowed that freedom to contract with his corporation which a stranger could enjoy. In *Stewart v. Lehigh Valley Railroad Co.*, 38 N. J. Law (9 Vr.) 522, it is shown that his trust relationship to his corporation is such as to render his contracts made with it voidable to the extent that such contracts cannot be enforced, as express contracts, against the will of the corporation. He may loan money to his corporation or perform personal service for his corporation, and the obligation for the repayment of the money loaned or for the payment of reasonable compensation for the service performed will arise by operation of law, but cannot exist by force of the express contract. *Gardner v. Butler*, 30 N. J. Eq. (3 Stew.) 702, 721.

In the present case defendant Marr, while a director, loaned to his corporation money which was at that time needed by the corporation, and which was used by it in its regular business. After repeated efforts upon the part of defendant Marr to induce the corporation to repay the money due to him he was compelled to bring suit and to issue execution on the judgment procured and make sale of the property of the corporation. It is now contended upon the part of complainant that the trust relationship which existed between the corporation and defendant Marr, as its president and one of its directors, denied to him the right to become a purchaser at the sale made under his execution.

I have not been able to reach the conclusion that the principles already stated can be properly extended to render such a sale invalid at the mere option of the corporation or its stockholders. Conditions may easily exist to justify a decree setting aside such a sale, for the purchase of the property of a corporation by its director, even under the circumstances named, may appropriately subject the transaction to the closest scrutiny in all its aspects as to fairness and good faith, but I entertain the view that something more is necessary to set aside such a sale than the mere exercise of a purpose to do so upon the part of the corporation or its stockholders. To deny to the judgment creditor the privilege to buy at such a sale is to deny to him a substantial right which may be essential to the effective enforcement of his judgment. His attitude of hostility to his corporation has, in such a case, become a necessity which has been brought about and made necessary by the wrongful conduct of the corporation. I find it difficult to recognize the undoubted right of a director to occupy the attitude of hostility to his corporation which arises in the enforcement of his claim by an action at law to compel payment and to deny to him the right to enforce the judgment procured with all the privileges which are incident to the judgment. In the exercise of that attitude of hostility, which is made necessary for the enforcement of his just claim against his corporation, it would seem that he should be entitled to the full privileges of a stranger, not only in the prosecution of his action, but as well in the enforcement of his judgment. If the evidence discloses that

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he has in fact exercised no other privileges, I think the sale should stand. It is urged by complainant that he should first resign, and thus render himself free to act. Such a course would ordinarily be empty and fruitless and equally subject to judicial investigation. When the facts disclose that he has not used his office to his own advantage, I cannot recognize the necessity or propriety of the application of a principle which operates, in such a case, to render the sale invalid at the mere instance of the corporation. In treating such sales as voidable, I think they should be so treated only to the extent that other judicial sales are so treated. If an inadequate amount has been bid, the law court from which the execution issued can afford an adequate remedy. *Palladino v. Hilpret*, 72 N. J. Eq. (2 Buch.) 270. If unfair advantage has arisen attributable to a trust relationship this court can appropriately grant relief.

I have found but little assistance in the adjudicated cases upon the subject. The case of *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, which is frequently cited in support of the right of the director-creditor to purchase, goes no further than to support the right in the case of a sale made by the trustee of a mortgage deed given by the corporation to secure a debt due to the director, and the suggestion is there made that the trustee making the sale is appointed by the corporation for the purpose and to that extent represents the corporation. *Saltmarsh v. Spaulding*, 147 Mass. 224, is to the same effect as *Twin-Lick Oil Co. v. Marbury*, *supra*. The case of *Lucas v. Friant*, 111 Mich. 426, 436, expressly holds that a director who is a judgment creditor may buy at the execution sale, but the decision is based on *Twin-Lick Oil Co. v. Marbury*, *supra*, and *Saltmarsh v. Spaulding*, *supra*, and other cases which do not fully support the text. The case of *Hoyle v. Plattsburgh and Montreal Railway Co.*, 54 N. Y. 315, 329, after holding that a director who is not a judgment creditor cannot purchase the property of his corporation at a judicial sale, proceeds as follows:

"Vilas, however, was not only a director; he was also the plaintiff in a judgment against the railroad company, and had a clear right to sell, upon execution on his judgment, the personal

property of the corporation which was liable to sale on execution. Whether in this right he might not, at a sale under his own or under prior executions, purchase in protection of his own right as judgment creditor, and hold property so purchased absolutely against the company, need not be determined in this case."

The subsequent case of *Preston v. Loughran*, 58 Hun 210, 214; S. C., 12 N. Y. Supp. 313, 316, refers to *Hoyle v. Plattsburgh and Montreal Railway Co.*, *supra*, and proceeds as follows:

"He (the director of a corporation) is not absolutely excluded from the right of dealing with it. He can loan money to it and become its creditor, and he can receive by the act of the corporation security for his debt. If he has a mortgage security he may foreclose the mortgage, and it follows, almost of necessity, that if he can foreclose he may protect himself by bidding at the sale. Of course, if he takes any undue advantage, another question arises. But when his acts are fair and open they are not invalid."

In *Hallam v. Indianola Hotel Co.*, 56 Iowa 178, the same view is taken, and in *re Iron Clay Brick Co.*, 19 Ont. Rep. 113; S. C., 33 Am. & Eng. Corp. Cas. 277, the contrary view is adopted.

I think that both reason and authority must be said to support the view already stated that a director in the enforcement of his execution against his corporation is privileged to purchase at the execution sale, and that the sale will not be set aside because of his trust relationship arising from the fact that he is a director, unless it appears that some undue advantage has been taken by him by reason of the position which he occupies.

It is urged in behalf of complainant that the conduct of defendant Marr was not fair and open in that he should have given notice of the sale to all the stockholders. I am unable to concur in that view. From the evidence adduced at the hearing I am satisfied that defendant Marr must be regarded in this case as the victim of the corporation rather than as one who has received undue advantage. The corporation had but few stockholders and was essentially the enterprise of a brother of defendant Marr, now deceased, whose stock complainant now holds by inheritance.

*2 Buch.**Marr v. Marr.*

Defendant Marr originally advanced a small amount of money to the corporation and also became a stockholder at the instance of and as a favor to his brother. As more money was needed by the corporation from time to time, defendant Marr was induced to make further advances because no other person identified with the enterprise appeared to be able to do so, and because of his desire to help the enterprise along on account of his brother's active interest in it. The advances thus made finally aggregated over \$10,000, and over \$2,000 had in the meantime, in like manner, been advanced by the wife of defendant Marr. After the death of his brother defendant Marr, at a meeting of the stockholders in December, 1897, stated that he must have the money due to him, and that he would proceed unless something was done. He also urged the stockholders to contribute and also offered to turn over his claim to anyone who would supply the money. Again, at a meeting of the stockholders in February, 1898, he urged payment and stated that he would proceed to collect unless paid. At one of these meetings a committee was appointed to make public sale of the entire property of the company. The sale was undertaken by a Philadelphia auction-house in April, 1898, and no bids were received. Mrs. Marr had, in the meantime, brought suit for the money due to her, and recovered judgment for \$2,088.15. In October, 1898, defendant Marr brought suit for the money due to him and recovered judgment for \$10,318.30, and in December, 1898, made sale of the property in question under an execution issued on that judgment. The judgment recovered by his wife had, in the meantime, been assigned to him. While no notice of the sale was given to the several stockholders, other than the statutory notice, I am entirely satisfied that it would have been utterly futile to have given such notice. Defendant Marr had earnestly tried to get the stockholders to interest themselves in raising the money due to him and had found it impossible. It is entirely clear to me that had each stockholder been personally notified of the day of sale no attention whatever would have been given to the matter by any of them. Defendant Marr did not want the property. He was judge of a court in Pennsylvania and did not wish to be

burdened with the ownership of a seashore hotel property, and especially one which had been found from the beginning to afford insufficient revenues to maintain it. His instructions to the attorney whom he employed to make the sale were to let the property be sold for less than was due on his judgments if a purchaser could be found. I am satisfied that the only reason that all parties in interest were not especially notified of the sale was because it was useless to do so. The property was purchased by defendant Marr at the sale because, and only because, no other purchaser could be found. No bid was made except that of defendant Marr. Since the purchase defendant Marr has found it necessary to continue to add to the investment in the hope of making the property remunerative, and at this time it stands him in about \$40,000. I am unable to find any circumstance from which I can conclude that defendant Marr has not performed his full duty to the corporation.

Touching the value of the property purchased I think that, in the proper hands, a purchaser could have probably been found for more than the amount of the judgments of defendant Marr. Witnesses at the hearing believe that the property, at the date of the sale, was worth at least \$25,000. At the sale attempted in Philadelphia \$18,000 was fixed as the price at which it should be sold. There was due to defendant Marr at the sale about \$12,500. His bid was but \$3,850. The small amount was bid because there were no other bidders, and it was sought to save sheriff's commissions. The bid was, in effect, from the standpoint of defendant Marr, the amount of the judgments, as the corporation had no other assets. If the property was in fact worth \$25,000 at the date of the sale, it is entirely clear that neither defendant Marr, or anyone else connected with the corporation, had any such idea of its value. It is not improbable that subsequent developments have given an enhanced idea of values in the retrospect. But, as already stated, I do not conceive it to be the duty of this court to disturb this sale, under the circumstances of this case, on the ground of inadequacy of price.

The bill is filed at this late date, seven years after the sale, by the heir of the brother of defendant Marr, on reaching his

2 Buch.O'Grady v. McDonald.

majority. At the time the transactions here occurred complainant had a guardian who attended the stockholders' meetings referred to at which proceedings were threatened to enforce the Marr claim. While I am not inclined to deny relief upon the ground of laches, the evidence clearly shows that the guardian of complainant had ample notice to apprise him that the Marr claim would probably be enforced by judgment. He testified: "I inferred that there would be a suit by the judge and a sale of the property."

I will advise a decree dismissing the bill.

MICHAEL O'GRADY

v.

CLARA McDONALD.

[Submitted March 25th, 1907. Decided March 27th, 1907.]

1. The proprietor of a hotel managed as "The Hotel Dominion" is entitled to restrain another from operating a new hotel under the name of "The New Dominion," as against the objection that the owner of the new hotel as tenant of the old improved its reputation by reason of his labors.

2. The proprietor of a hotel managed as "The Hotel Dominion" is entitled to an injunction restraining the use by another proprietor of a hotel of the name "The New Dominion," on the ground that the name of the new hotel will aid in procuring guests theretofore patronizing the old one.

On bill for injunction.

Complainant is the owner of a hotel on Arkansas avenue, in Atlantic City, known as "The Hotel Dominion," and seeks to restrain defendant from using the name "The New Dominion"

O'Grady v. McDonald.72 Eq.

for a hotel which defendant has recently erected on that avenue within a few hundred feet from the hotel owned by complainant. The theory of the bill is that defendant is violating rights which complainant has acquired by prior appropriation of the trade name stated.

Heard, at the return of an order to show cause for a preliminary injunction, on bill and affidavits and answer and affidavits.

Messrs. Thompson & Cole, for the complainant.

Messrs. Bourgeois & Sooy, for the defendants.

LEAMING, V. C.

There can be no doubt of the power of a court of equity to restrain the improper use of a trade name. The principles involved are, in many respects, analogous to those arising in the protection of trade marks. *Busch v. Gross*, 71 N. J. Eq. (1 Buch.) 508; *International Silver Co. v. William H. Rogers Corporation*, 67 N. J. Eq. (1 Robb.) 646; *Eureka Fire Hose Co. v. Eureka Manufacturing Co.*, 69 N. J. Eq. (3 Robb.) 159. Complainant's hotel has been conducted under the name "The Hotel Dominion" for upwards of twelve years. That name has necessarily become so associated with the hotel that complainant is clearly entitled to protection against the use of the same or a similar name in such manner as to be likely to deceive or mislead the public. Defendant claims, however, that she was a tenant of complainant's hotel from March 1st, 1896, to March 1st, 1897, and during that time gave the hotel of complainant a high standing under its old name, which name, she claims, was of little value prior to that time. I think this fact wholly immaterial. Defendant leased the hotel for one year furnished and ready for occupancy. Her lease described the property as "The Hotel Dominion." If during the year of her tenancy the reputation of the hotel was improved by reason of her labors, that fact cannot properly be held to entitle her to the use of the name for an opposition hotel at the end of her term. Had the name been one of her own adoption, as in *Wilcozen v. McCray*, 38 N.

2 Buch.O'Grady v. McDonald.

J. Eq. (11 Stew.) 466, and not one which she only became entitled to use because she was a tenant of the property of complainant, an altogether different condition might exist.

The more difficult question is whether the name "The New Dominion," as used by defendant, is likely to operate to deceive or mislead the public. A question of this nature necessarily depends largely upon the special circumstances of the individual case. In *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, the proprietors of a store known as "Mechanics Store" were awarded an injunction against the use, by an opposition concern, of the name "Mechanical Store." In *Gamble v. Stephenson*, 10 Mo. App. 581, the proprietor of "What Cheer" restaurant was awarded relief against the name "New and Original What Cheer Restaurant." In *Colton v. Thomas*, 2 Brews. 308, the name "Colton Dental Association" was protected against the use of the name "Colton Dental Rooms." In *Cady v. Schultz*, 19 R. I. 193; *S. C.*, 61 Am. St. Rep. 763, the name "United States Dental Association" was protected against the use of the name "U. S. Dental Association." In each of these cases various circumstances existed of more or less force to control the decisions rendered, but the essential inquiry in all cases is: Is the new name, as used, calculated to deceive or mislead? In the present case no reason is suggested by defendant for her desire to use the name "dominion" in her new enterprise, but the inference is present that she finds in the name adopted some aid to the procurement of guests who have heretofore patronized the old hotel. I am unable to believe that this will not be the effect of the use of the name if that use is permitted.

I will advise that a preliminary injunction issue pursuant to the prayer of the bill.

Centenary Fund v. Lake.

72 Eq.

THE CENTENARY FUND AND PREACHERS' AID SOCIETY OF THE
NEW JERSEY ANNUAL CONFERENCE OF THE METHODIST
EPISCOPAL CHURCH, trustee, under the last will and testa-
ment of Ezra B. Lake, deceased,

v.

MARTHA H. LAKE et al.

[Submitted March 25th, 1907. Decided March 29th, 1907.]

1. The provision in a will, "I do hereby will and bequeath unto * * * all my real estate and personal property not disposed of in some other way," carries the legal title to the real estate referred to, since the word "bequeath," when expressly applied to real estate, is equivalent to the word "devise," and under 3 Gen. Stat. p. 3763 § 35, words of inheritance are made unnecessary.

2. Where an absolute power of sale is given in a will, no condition subsequent or limitation in trust can be held operative against a title emanating under a proper exercise of the power, since the power of sale *ex proprio vigore* subordinates the condition.

On bill for the construction of the will of Ezra B. Lake.
Heard on bill, answer, replication and proofs.

Mr. S. Stanger Iszard, for the complainant.

Messrs. Bleakly & Stockwell, for the defendants.

LEAMING, V. C.

I find no uncertain features touching this will. The intention of the testator appears to me to be clearly manifest throughout.

The expression, "I do hereby will and bequeath unto * * * all of my real estate and personal property not disposed of in some other way," carries the legal title to the real estate referred to. The word "bequeath," when expressly applied to real estate, is uniformly treated as the equivalent to the word "devise," and

2 Buch.Centenary Fund v. Lake.

words of inheritance are made unnecessary by 3 Gen. Stat. p. 3763 § 35.

The apprehensions which appear to have arisen by reason of the forfeiture clauses contained in the will are equally groundless. It is entirely immaterial whether these clauses be treated as conditions subsequent or as limitations in trust, for where an absolute power of sale is given no condition subsequent can be held operative against a title emanating under a proper exercise of the power. An intention upon the part of testator to authorize a sale subject to conditions subsequent is an impossible conception. The power of sale *ex proprio vigore* subordinates the condition.

The power of sale is equally clear. Testator expressly authorizes the sale of real estate when there is insufficient cash on hand to pay the fixed charges. The testator also clearly expresses his purpose that the proceeds of sales of real estate shall be preserved intact, except as to the temporary use of such proceeds in anticipation of revenues to be received from other sources to supply the proceeds thus temporarily used. To comply with this requirement it is now manifestly necessary to sell all the real estate in order that its value may be made revenue producing, and thus afford a fund from which the fixed charges can be paid.

I entertain no doubt as to the power to sell the entire real estate at either public or private sale, and to confer an absolute title upon the purchasers.

Feinberg v. Feinberg.72 Hq.

HAZER FEINBERG

v.

ANNIE FEINBERG.

[Submitted April 1st, 1907. Decided April 2d, 1907.]

Though the removal from the state, by defendant in a divorce suit, without consent of petitioner or order of court, of the minor child, custody of which was awarded defendant, with right of visitation to petitioner, was contrary to *P. L. 1902 p. 259 § 7*, petitioner cannot be relieved from making payments for maintenance of such child, which have accrued under the order of court, without complaint to the court touching such removal.

On petition of Hazer Feinberg for modification of that part of the decree of divorce providing for maintenance of minor child Sylvia Feinberg, and for correction of taxed costs.

Mr. Andrew J. King, for the petitioner.

Mr. John W. Wescott, for the defendant.

LEAMING, V. C.

It is clearly contrary to the terms of section 7 of the act concerning the custody and maintenance of minor children (*P. L. 1902 p. 259*) for defendant to remove the minor in question out of the jurisdiction of this court, without first obtaining the consent of petitioner or an order of this court for that purpose. I am unable, however, to relieve against the payment of such moneys as have accrued under the existing decree during the period in which no complaint has been made to the court touching such removal. It is not the privilege of petitioner to refuse payments accruing pursuant to the terms of the decree. When new conditions arise which, in the opinion of petitioner, entitle him to a modification of the decree, he should make application to the court for such modification if he desires to avail himself

2 Buch.Feinberg v. Feinberg.

of rights arising from the new conditions. On such an application the court may or may not, according to the circumstances of the case, under the terms of the section referred to, permit the custody of the minor to be maintained in another jurisdiction. It is manifest that in this cause it would be destructive of the right of visitation to make an order permitting the custody of the minor to be maintained in Pittsburg, but it is not clear that circumstances may not exist which would equitably demand an order for such privilege in Philadelphia. I am obliged to deny the application to reduce the amount now due for maintenance under the terms of the decree, but I am not prepared to make a final order touching the future modification of the decree without further hearing. On Monday, April 8th, 1907, the respective parties may, if so advised, file further affidavits to aid the court in determining whether an order should be made discontinuing payments until the minor is returned to this jurisdiction, or whether the order should permit the minor to be maintained in Philadelphia, with the right of visitation, as specified in the decree, fully protected. If no further affidavits are then filed, an order will be made on the present record.

Touching the taxed costs, I find that the order of September 4th, 1906, as advised by Vice-Chancellor Bergen, adjudges it error to include the items based on the petition for rehearing. These items, I find, amount to \$35.69. I will advise that the costs be reformed by the elimination of these items.

The decree of affirmance made by the court of errors and appeals is in the ordinary form of general decrees of affirmance, and reads "with costs." I am not prepared to assume that the court intentionally awarded costs against a wife until opportunity shall be afforded to her to apply to that court for relief against that part of its decree. Petitioner will be privileged to insist upon the benefit of the decree of affirmance as it exists, but if insisted upon by petitioner, defendant will be given the opportunity to apply to the court of errors and appeals for its modification before a final order will be here made touching that feature.

Barton v. Slifer.

72 Eq.

CHARLES S. BARTON and FANNIE A. BARTON

v.

LEVI K. SLIFER.

[Submitted April 15th, 1907. Decided April 17th, 1907.]

1. Where an owner of land lays it out into streets and lots, and adopts a restrictive covenant as to the building line, and inserts the covenant in all deeds as an exaction from all purchasers for the benefit of each, the equitable right to enforce the covenant enures to each purchaser, irrespective of when he purchased.

2. Complainants showed a right to enforce a restrictive building covenant where their bill averred the purchase of the original tract of land by an association, its subdivision into lots, the adoption of a general building scheme to secure an unobstructed view, &c., to the lot purchasers, the adoption of the restrictive covenant, and its insertion in all deeds made by the association.

3. Where the deeds to all lots in a town contained a uniform restrictive building covenant, complainants' right to enforce it against a neighboring owner was not lost because there had been several violations of the covenant, where the violations in no substantial way affected their property, and did not show any intention to abandon the general plan in the district wherein the parties' property was located.

4. Complainants were not estopped by laches to enforce a restrictive building covenant where, when defendant attempted to violate it, they promptly notified the foreman of the work that their rights were being violated, and where a bill was thereafter filed as quickly as it could be procured.

On bill for injunction.

The bill is filed by complainants to restrain defendant from the erection of a building in violation of the following restrictive building covenant:

"And also under and subject to the express conditions and restrictions that no building of any description whatever shall at any time be erected within ten feet of the front line of said avenue, nor within four feet of the side lines of said lot (excepting where a party may own two or more contiguous lots, then a building may be erected on any part of the lot or

*2 Buch.**Barton v. Slifer.*

lots the owner thereof may desire, without regard to the intervening line or lines, provided the same is not built within four feet of the outside lines of said lots, nor within ten feet of the front lines thereof), and also that no building, or any part thereof, erected upon the said lot or lots, shall be used or occupied as a livery or sales stable, dye-house, bone-boiling or skin-dressing establishment, soap, candle, glue, starch, lamp-black, poudrette or fish guano manufactory, slaughter-house, piggery or tannery. Nor shall any building be used or occupied as a drug store, without the written consent of the said party of the first part hereto."

The act sought to be enjoined consists of the violation of that part of the covenant prohibiting the erection of a building within four feet of the side line of defendant's lot.

In the year 1879 the tract of land which now comprises Ocean City, Cape May county, was a wild beach and was purchased by the Ocean City Association and laid out in streets and lots with a view to the establishment of a Christian seaside resort. To that end the covenant in question, with other covenants, was adopted by the association and inserted in all deeds made by it as a part of a general scheme adopted by it for the benefit of the entire tract with the purpose of securing, among other things, a space of at least eight feet between all buildings to afford light, air, view and fire protection.

The lot now owned by complainants was conveyed by the Ocean City Association to John C. Lake, by deed dated February 3d, 1885. The lot now owned by defendant was conveyed by the Ocean City Association to Jacob B. Graw, by deed dated July 21st, 1886. The deed held by defendant expressly recites that the conveyance is subject to the operation of the covenant above referred to.

The northeasterly line of Ninth street forms the southwesterly side line of the two lots in question, and the lot owned by defendant is next oceanward of that owned by complainants.

A building has been erected on the lot owned by complainants, and that building is located on the lot in conformity to the requirements of the covenant. The proposed building of defendant, if erected of the width intended, will operate to obstruct the view and air to complainants' lot to a greater degree than would be the case if the building should be erected in conformity to the restrictive covenant.

Barton v. Slifer.

72 Eq.

This cause has been heard, at the return of an order to show cause for a preliminary injunction, on amended bill and affidavits and answering affidavits.

Messrs. Bourgeois & Sooy, for the complainants.

Messrs. Thompson & Cole, for the defendant.

LEAMING, V. C.

When an owner of a tract of land lays it out into streets and lots and adopts a restrictive covenant of the nature of the one now in question with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to the enforcement of the covenant enures to each purchaser irrespective of the time of his purchase. Under the conditions named the benefit to be derived from the covenant as a part of the general scheme necessarily enters into the consideration of each purchase, although the covenant may, in terms, only bind each purchaser and his heirs and assigns.

It is urged on behalf of defendant that the present amended bill and annexed affidavits do not afford sufficient evidence of the conditions above stated to warrant the issuance of the preliminary writ sought. While the amended bill and affidavits annexed to it are not as explicit in details as might be desired, I entertain the view that the averments are sufficient to bring complainants' case within the rule stated. The amended bill shows the purchase of the original tract by the Ocean City Association and its subdivision into lots for sale and the preparation and filing of a map showing the lots thus defined and the adoption by that corporation of "a general building scheme for the purpose of securing the unobstructed view and light and air," and the adoption of the restrictive covenant now in question and the insertion of that covenant in all deeds which have been executed by the corporation. The affidavit of S. Wesley Lake, an-

*2 Buch.**Barton v. Slifer.*

nexed to the amended bill, sets forth that the corporation was organized for the establishment of a Christian seaside resort, and that the corporation inserted the covenant in question in all deeds made by it in order that the place might be more desirable as a place of residence, and that the object of the corporation was to make it impossible for the city to be built up solid and to secure a space of eight feet between all buildings for the circulation of air and the preservation of view and fire protection for the enjoyment of all people, and that over seven thousand lots have been sold by the corporation, and that no lot has been sold without the covenant in question being embodied in the deed of conveyance. None of these averments are controverted.

It is also contended on behalf of defendant that there has been such a departure from the general scheme designed to be preserved by the restrictive covenant as to amount to a waiver of the right to its enforcement.

The record discloses that the territory extending from Eighth to Ninth street, in Ocean City, has, in recent years, become the business portion of the city. In that territory the covenant in question has been frequently violated. Some twelve buildings have been there erected in disregard of the covenant, some as to the front building line and some as to the side lines. But the amended bill alleges that the territory extending southwesterly from Ninth street to Fourteenth street, and from the ocean to the bay, in which territory there are now three hundred and eighty buildings, of which three hundred and thirty are residences, is essentially the residential portion of the city, and that in that territory the covenant has been preserved. The side lines of the lots in question are on Eleventh street, which street runs northwesterly and southeasterly from the ocean to the bay, and is approximately the centre of the territory referred to in the bill as the residential portion of the tract. The answering affidavits point out six buildings within the territory between Ninth and Fourteenth streets which are claimed to be located contrary to the requirements of the covenant. One of these is on Ninth street and another on Asbury avenue near Ninth street. These two buildings are approximately two blocks distant from com-

plainants' lots and are on other streets, and are adjacent to the territory which has been referred to as the business section of the city, and it is manifest that any violation of the covenant occasioned by these two buildings in no way affects the desirability of complainants' property. A third building referred to as between Ninth and Fourteenth streets is the Steward building, which building is located on the east corner of Twelfth street and Asbury avenue. It is averred that the porch posts of that building are flush with the side line of Twelfth street. As to this building it may be said that it is by no means certain that the location of the porch posts as pointed out operates as a violation of the covenant. But, without determining that question, it will be observed that the location of the Steward building, like the two buildings already referred to, is on streets other than that on which complainants' property is located, and is more than a block distant, and in no way affects the desirability of complainants' property. The fourth building pointed out by defendant's affidavits is at Twelfth street and Asbury avenue. This, like the other properties already referred to, is too distant from complainants' property to in any way affect its desirability. The fifth violation of the covenant referred to as within the residential district is one now under construction at Eleventh street and Bay avenue, which building is being erected on the line of Eleventh street. The map filed by defendant does not disclose Bay avenue. It is evident that this structure must be many blocks distant from complainants' property. The sixth violation of the covenant referred to as within the territory defined as residential is a building occupied by N. C. Clell—and which is situated on the corner of Eleventh street and Asbury avenue. This building fronts on a street in which complainants are not interested, but the side of the building is on the opposite side of the same street on which complainants' property is located, and one block oceanward thereof.

It is pointed out that the front of this building violates the covenant in question, and that at the side of the residence portion of the building brick steps lead from the building to the side line of the street, and the porch encroaches on the building

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line. Complainants' property is in no way affected by the front encroachment, and while the porch and steps at the side of the building may operate to violate the covenant, it is manifest that any violation there may be is trivial in its nature.

This review of the testimony is made necessary to intelligently determine whether complainants' right to enforce this covenant against defendant has been lost. From the review it will be observed that there have been no violations of the covenant which have in any substantial way affected the property of complainants, and but two possible violations upon the streets on which complainants' lot is situated, and that but six violations of the covenant are alleged within a district in which three hundred and eighty buildings are erected.

I think it clear that the equitable right of complainants to enforce this restrictive covenant has not been lost. Even though it should be conceded that the twelve violations of the covenant which have been permitted in what has been defined as the business district northeasterly of Ninth street has amounted to an abandonment, in that district, of the original scheme designed to be preserved by the covenant, it does not follow from that fact that the right to the enforcement of the covenant for the preservation of the original scheme in a separate district where essentially different conditions prevail has been lost. Changing conditions, such as the growth of business interests, may well modify the needs of one portion of a city to such an extent as to induce the abandonment of the general plan as to that portion without any intentional abandonment of the plan as to territory where other and radically different conditions prevail. In this view I am unable to regard the breaches of the covenant in the territory northeasterly of Ninth street as evidence of an intention to abandon the preservation of the general plan in the residential portion of the city referred to.

As to the territory southwesterly of Ninth street, which has been defined as the residential district, I entertain the view that the six violations of the covenant pointed out by defendant cannot be considered as sufficient evidence to indicate the abandonment of the original plan in the district where nearly four

hundred buildings have been erected in conformity to the plan. The extremely small percentage of the breaches of the covenant which defendant has pointed out rather tends to the establishment of the fact that it has been the defined purpose of the property holders in that district to adhere to the preservation of the original plan sought to be preserved by the covenant.

I think it also clear that the equitable right of complainants to the enforcement of the covenant in question is not impaired by isolated breaches of the covenant in locations where such breaches can in no way be said to affect the desirability of complainants' property. It is not to be expected that the courts will be appealed to for the preservation of the general scheme in localities where a complainant is without interest. It is only when the interest of a property owner is affected that, in my judgment, he can be reasonably charged with the duty of applying to the court for the preservation of the general scheme. This view is forcefully expressed by Vice-Chancellor Emery, in *Morrow v. Hasselman*, 69 N. J. Eq. (3 Robb.) 612, and I concur in the conclusions there stated by the learned vice-chancellor.

It is also claimed, on behalf of defendant, that complainants are in laches in permitting the building of defendant to become partially erected before the bill was filed. I think complainants have done all that can be reasonably required of them. Defendant is not a resident of this state. Complainants promptly gave notice to the foreman of the work that their rights were being violated, and the bill was thereafter filed as quickly as it could be procured.

A preliminary injunction will be advised, in accordance with the prayer of the amended bill.

2 Buch.Continental Compressed Air Co. v. Franklyn.

THE CONTINENTAL COMPRESSED AIR COMPANY

v.

CLAUDE S. FRANKLYN.

[Submitted April 15th, 1907. Decided April 17th, 1907.]

1. A garnishee by a statutory plea denying indebtedness to the defendant in attachment being entitled to raise the question at law whether the defendant in attachment could lawfully exercise an option in a contract to declare the contract void, and thus discharge the garnishee's obligation to make payment under the contract, the garnishee was not entitled to maintain a bill to enjoin the proceedings at law in order to obtain a determination of such question in equity.

2. The remedial powers of a court of equity to enforce by injunction equitable rights which cannot be enforced at law may be exercised after, as well as before, judgment at law.

On bill for injunction to restrain action at law.

Defendant issued an attachment against the Taylor Hydraulic Air Compressed Company, limited, and served notice of garnishment on complainant. The defendant in attachment appeared, and at trial judgment was rendered against it for the amount of the debt for which the attachment was issued. Action by *scire facias* is now pending by defendant against complainant for the recovery of an indebtedness alleged to have been due from complainant to the defendant in attachment at the time of the garnishment. The bill now filed by complainant seeks to restrain the pending action. The demand for equitable relief is based upon the claim that the statutory plea which complainant is required to file in the pending action at law is insufficient to fully protect its rights. The bill alleges that the supposed debt which was garnished was money then due from complainant to the defendant in attachment under a certain written contract, in which contract the right was given to the defendant in attachment to exercise the option, in the event of a default of payment,

to declare the contract void and return certain moneys already paid, and that such option was exercised by the defendant in attachment after the attachment was issued and the garnishment made.

Mr. John Meirs, for the complainant.

Mr. Harvey F. Carr, for the defendant.

LEAMING, V. C.

I am unable to recognize equitable jurisdiction in this cause. Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, this court will not stay the proceedings at law. The suggestion of equitable jurisdiction in this cause is based upon the claim that the statutory plea of complainant as garnishee, to the effect that it is not indebted to the defendant in attachment, is inadequate to enable complainant to disclose and avail itself of the conditions stated in the bill. It seems manifest that there can be no foundation for that claim. That statutory plea is treated by the courts as substantially a general issue and as sufficient to enable the court to fully determine the rights of the parties. *Welsh v. Blackwell*, 14 N. J. Law (3 Gr.) 55, 56. With that breadth given to the statutory issue at law, it necessarily follows that, in determining whether the defendant in attachment could lawfully exercise the option to declare the contract void and thus discharge complainant's obligation as garnishee to make the payments named in the contract, the law court will be controlled by the same principles which would control this court in the determination of the same question.

While I am entirely clear that complainant has no rights which may not be fully protected in the pending action at law, it may not be inappropriate to add that should it transpire that equitable rights do exist which the law courts are unable to enforce by reason of limitations incident to their procedure or rules of action, the remedial powers of this court may be extended to such conditions as well after as before judgment.

The injunction now sought will be denied.

2 Buch.

Spear v. Locust Wood Cemetery Co.

CHARLES C. SPEAR

v.

LOCUST WOOD CEMETERY COMPANY et al.

[Submitted April 15th, 1907. Decided April 19th, 1907.]

1. The act of April 8th, 1875, section 8 (*Rev. p. 102; Gen. Stat. p. 350 § 8*), exempts from sale under execution the cemetery lands and property of any association formed pursuant to that act or otherwise incorporated. Complainant, through his attorney in fact, sold land to a cemetery association with full knowledge that it was for use as a cemetery.—*Held*, that he was precluded under the statute from foreclosing the purchase-money mortgage on the land.

2. The act of March 14th, 1851, section 10 (*P. L. 1851 p. 257*), exempted the lands of cemetery associations formed thereunder from sale under execution. The act of April 8th, 1875 (*Rev. p. 102; Gen. Stat. p. 350*), repealed the act of 1851. The act of March 14th, 1879 (*P. L. 1879 p. 318; Gen. Stat. p. 360 § 56*), amended section 10 of the repealed act of 1851.—*Held*, that the act of 1879 does not repeal the act of 1875.

3. The act of April 8th, 1875, section 8 (*Rev. p. 102; Gen. Stat. p. 350 § 8*), exempting from sale under execution the cemetery lands and property of cemetery associations, applies only to land of the association actually brought into use as a cemetery, though the act of May 9th, 1889 (*P. L. 1889 p. 418; Gen. Stat. p. 356 § 40*), authorizes the holding of one hundred and twenty-five acres for cemetery purposes.

4. The act of March 21st, 1881 (*P. L. 1881 p. 158; Gen. Stat. p. 353 § 18*), provides that the rents, &c., of land held by a cemetery association may be taken and sequestered and applied to the payment of judgments against the association, and the court of chancery may appoint a receiver to take and apply the rents, &c., for that purpose.—*Held*, that where the lands of a cemetery association not used as a cemetery are sold to satisfy a mortgage on the entire tract owned by the association, and the proceeds are insufficient to satisfy the amount due, a receiver may be appointed to take possession of the cemetery tract reserved from sale and sequester the income for application to the amount remaining due under the decree of foreclosure.

On bill to foreclose, &c. Final hearing on pleadings and proofs.

The bill seeks to foreclose a purchase-money mortgage made November 17th, 1902, by the Locust Wood Cemetery Company

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to complainant. The defence is made that by the provisions of section 8 of the Cemetery act of 1875 (*Gen. Stat. p. 350 § 8*), the cemetery lands covered by the mortgage cannot be sold to satisfy the mortgage debt.

Messrs. French & Richards, for the complainant.

Mr. John F. Harned, for the defendants.

LEAMING, V. C.

Defendant Locust Wood Cemetery Company was incorporated April 29th, 1902, under the General Corporation act. The object for which the corporation was formed is defined in its certificate of incorporation as: "To maintain cemetery or cemeteries." November 17th, 1902, complainant conveyed to defendant Locust Wood Cemetery Company the tract of land now in question, and at the same time that company executed to complainant a purchase-money mortgage on the land conveyed to secure the payment of a bond given by the company for a part of the purchase price. Defendant Locust Wood Cemetery Company brought into use as a cemetery a portion of the mortgaged premises and operated as a cemetery company until November 17th, 1904, when one hundred and twenty-five acres of the mortgaged premises, including the part in use as a cemetery, was conveyed by it to defendant Locust Wood Cemetery Association, the latter corporation having been formed under the Cemetery act of 1875 (*Gen. Stat. p. 349*), for the purpose of taking over that portion of the land. The present foreclosure of the mortgage is resisted as to the one hundred and twenty-five acres conveyed to the latter company under the claim that the statute exempts the land from sale.

Section 8 of the act of April 8th, 1875 (*Gen. Stat. p. 350 § 8*), exempts from sale under execution "the cemetery lands and property" of any association formed pursuant to that act, "or otherwise incorporated." This section is substantially the same as section 10 of the act of March 14th, 1851. *P. L. 1851 p. 257*. As is suggested in *Rosedale Cemetery Association v. Linden Township*, 73 N. J. Law (44 Vr.) 421, the purpose of this legis-

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lation is the protection and preservation of the places where the dead are buried.

The contention is made on behalf of complainant that the present mortgage, as a purchase-money mortgage, will be protected from the operation of the section. This contention cannot prevail. If complainant could be said to occupy the position of one who had taken a mortgage on lands not devoted to use as a cemetery, I entertain no doubt that the subsequent dedication of the land to cemetery purposes, without the consent of the mortgagee, could not, under our constitution, operate to impair the mortgage security. But it is impossible to give to complainant the benefit of that status. The evidence disclosed that the cemetery company tentatively arranged with complainant's attorney in fact for the purchase of this land for use as a cemetery several months prior to the sale, and that company was permitted by complainant's attorney in fact (who afterwards conveyed the land for complainant) to take possession and lay out a portion of the land into cemetery lots as early as August, 1902, and during that time the attorney in fact referred to was a member of the cemetery company. It is entirely clear that the sale of the land was made by complainant, through the attorney in fact, to the cemetery company with full knowledge that it was for use as a cemetery, and the mortgage must be regarded as having been accepted by complainant with a full knowledge of and acquiescence in the proposed use of the land. Under these circumstances the rights of the mortgagee cannot properly be considered as free from the burden imposed by the statute.

The contention is also made that the provisions of section 8, above referred to, are superseded by an act of March 14th, 1879. *Gen. Stat. p. 360 § 56.* The act of 1879 is a supplement to the act of 1851, above referred to, and amends section 10 of that act. The act of 1851 was repealed in 1875. The curious legislation thus presented is an amendment of a repealed statute. In the consideration of this statute in *Newark v. Mount Pleasant Cemetery Co.*, 58 N. J. Law (29 Vr.) 168, 173, the court of errors and appeals finds no legislative intent to apply its provisions to cemetery corporations other than those incorporated under the act of 1851.

Having reached the conclusion that section 8 of the act of 1875 operates to exempt "the cemetery lands and property" of defendants from sale under a decree of foreclosure of the mortgage held by complainant, it becomes necessary to determine whether all the land covered by the mortgage is so exempt, and if not, what part thereof.

The evidence discloses that but a small portion of the land covered by the mortgage has been brought into use as a cemetery. About one hundred burial lots have been sold and about thirty interments have been made. The contention is made that as the act of May 9th, 1889 (*Gen. Stat. p. 356 § 40*), authorizes one hundred and twenty-five acres to be held for cemetery purposes, and as that exact acreage was accordingly conveyed to the Locust Wood Cemetery Association, the entire one hundred and twenty-five acres will be exempted from sale. This contention cannot be maintained. The exempting section (section 8) defines as exempt from taxation and also from sale under execution "the cemetery lands and property" of the association. I think that the only reasonable construction of the language used is that the land intended by the legislature to be exempted from taxation and from sale under execution is the land actually brought into use for cemetery purposes. With no limitation at that time existing upon the quantity of land which a cemetery company could own, the legislative intent to exempt from taxation and from sale all lands which cemetery companies might acquire cannot be reasonably assumed from the language used. The natural significance of the words "cemetery lands," as well as the manifest purpose of the legislation, indicates an intention to extend the exemptions only to lands actually used for cemetery purposes. This view of the legislative purpose led the supreme court, in *Rosedale Cemetery Association v. Linden Township, supra*, to construe the word "property," as used in this section, as inapplicable to personal property.

The view here taken renders necessary the ascertainment, by exact boundaries, of the lands which shall not be subject to the decree of sale. For that purpose a master will be appointed whose duty it will be to ascertain and report the boundaries of the land which is in use for burial purposes. Upon the confirma-

2 Buch.Thatcher v. Consumers' Gas and Fuel Co.

tion of that report a decree will be made for the sale of the remainder of the land in satisfaction of the amount due on the mortgage held by complainant. If the proceeds of sale are not sufficient to satisfy the amount due, a receiver may be appointed pursuant to the act of March 21st, 1881 (*Gen. Stat. p. 353 § 18*), to take possession of the cemetery tract reserved from sale and sequester the income for application to the amount remaining due under the decree of foreclosure.

CHARLES T. THATCHER

v.

CONSUMERS' GAS AND FUEL COMPANY.

[Submitted April 15th, 1907. Decided April 29th, 1907.]

The act of March 27th, 1878 (*Gen. Stat. p. 1613 § 33*), providing that whenever it may be necessary for any gaslight company to increase its bonded indebtedness it may, by a majority vote of its board of directors, with the consent of a majority of the stockholders holding sixty per cent. of the capital stock, increase the bonded indebtedness to an amount not exceeding two-thirds of the amount of the capital stock, merely conferred additional powers on such corporations as were not previously allowed to issue bonds to the amount fixed by the act, and did not restrict the privileges of those that already possessed the power to create bonded indebtedness to a greater amount than that named in the act.

On bill for injunction.

Defendant is a gas company of Atlantic City, New Jersey, incorporated under the General Gas act of April 21st, 1876 (*Gen. Stat. p. 1608*), and is about to increase its bonded indebtedness to an amount exceeding two-thirds of the amount of its capital stock. Complainant is a stockholder and seeks to enjoin the proposed corporate action upon the ground that the act of March

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27th, 1878 (*Gen. Stat. p. 1613*), restricts the bonded indebtedness of gas companies to two-thirds of the amount of their capital stock.

The act of March 27th, 1878, is as follows:

"An act to enable gaslight companies, incorporated under the laws of this state, to increase their bonded indebtedness. Approved March 27th, 1878.

"SEC. 1. That whenever it may be necessary for any gaslight company, incorporated under the laws of this state, to increase their bonded indebtedness, for the purpose of increasing their business, or for any other purpose, then and in that case the said corporation, by a majority vote of its board of directors, after having obtained the consent of a majority of the stockholders representing at least sixty (60) per cent. of the capital stock, be and they are hereby authorized to increase said bonded indebtedness to any amount not exceeding two-thirds of the amount of the capital stock of said company, the said increase as aforesaid to be governed by the law and pursued under the mode directed by the act of incorporation of such gaslight company."

Messrs. Thompson & Cole, for the complainant.

Messrs. Bourgeois & Sooy and *Mr. Charles L. Corbin*, for the defendant.

LEAMING, V. C.

The only question here involved is whether or not the act of March 27th, 1878 (*Gen. Stat. p. 1613*), above quoted, operates to render it unlawful for a gas company, which is incorporated under what is known as the General Gas Company act (*Gen. Stat. p. 1608*), to issue bonds to an amount in excess of two-thirds of the amount of its capital stock.

A brief statement of the condition of the law at the time the act now in question was enacted would seem to be essential to a perfect understanding of the legislative purpose in its enactment.

The general act for the formation of gas companies was passed at the first session of the legislature after the constitutional amendment became operative which prevented special legislation conferring corporate powers. That act contains no provision touching the right of corporations organized under it to incur debts or to issue bonds or other evidences of indebtedness. In

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the absence of such provision the right existed as an implied power. *Lucas v. Pitney*, 27 N. J. Law (3 Dutch.) 221, 228; *Fifth Ward Savings Bank v. First National Bank*, 48 N. J. Law (19 Vr.) 513, 523; 4 *Thomp. Corp. Off.* § 5697; 5 *Id.* 6050, 6051. The right to execute a mortgage which should include corporate franchises in its lien could not exist as an implied power. That right existed in virtue of the General Corporation act, which provided "that every corporation, as such, shall be deemed to have power * * * to mortgage any such real or personal estate with their franchises." In 1891, and again in 1897 and 1902, the legislature passed supplements to the General Gas act authorizing gas companies formed under that act to execute mortgages on their real and personal property, including their franchises. *P. L. 1891 p. 271*; *P. L. 1897 p. 202*; *P. L. 1902 p. 277*. These supplements were, I think, wholly unnecessary.

The act now in question was enacted two years after the General Gas act, but not as a supplement to it. At that time there existed in this state a great number of gas companies incorporated by special legislative acts. An examination of these special acts will disclose that a great number of them contain provisions authorizing money to be borrowed and bonds and other assurances to be issued therefor to an amount not exceeding one-half of the amount of the capital stock; others contain similar express powers to the amount of two-thirds of the capital stock; others contain provisions for borrowing money and issuing securities without any restriction as to amount, and others contain no provisions touching the subject of indebtedness.

With this general view of the condition of legislation at the time, the legislative purpose in the passage of the act in question seems apparent. The act is, by its title, an enabling act. It is "to enable gaslight companies, incorporated under the laws of this state, to increase their bonded indebtedness." The provisions of the act enabling the increase of bonded indebtedness necessarily assume in the corporations to be affected by it a pre-existing but restricted power to create a bonded indebtedness. This clearly negatives any possible legislative purpose to apply the operation of the act to corporations already possessing the

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powers without restriction, and therefore excludes from any rational legislative intent such corporations as already possessed the power to create bonded indebtedness to a greater amount than that named in the act. I think it clear, therefore, that the act can only be regarded as an act conferring additional powers on such corporations as were previously restricted in the particulars referred to.

A preliminary injunction will be denied.

CLIFTON C. SHINN, receiver, &c.,

v.

GUSTAVE A. KUMMERLE et al.

[Submitted April 11th, 1907. Decided May 1st, 1907.]

The General Corporation act, sections 64 and 86 (*P. L. 1896 pp. 298, 304*), making preferments in contemplation of insolvency void, does not authorize equity at the suit of the receiver of a corporation to set aside a judgment against it in favor of the wife of its president, resulting from his activity in her behalf and the purposeless inaction of the remaining directors.

On bill by a receiver to set aside a judgment.

Messrs. Thompson & Cole, for the complainant.

Mr. Edward A. Armstrong, for the defendants.

LEAMING, V. C.

I am unable to reach the conclusion contended for by complainant. It is clear that to relieve against the judgment in question the provisions of sections 64 and 86 of the General Corporation act must be extended beyond their terms and beyond

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any scope heretofore given to these sections by the adjudicated cases.

Had the evidence disclosed a concerted plan among the directors to protect this claim by permitting it to go to judgment and then to secure a receivership to prevent the procurement of other judgments, it would be difficult to distinguish the transaction in its inherent quality from a confessed judgment or a voluntary transfer of assets by way of preference, but I am compelled from the evidence to view the judgment as the legitimate result of selfish activity upon the part of the president, in behalf of his wife, involuntarily aided by a purposeless inaction upon the part of the remaining directors. The court of chancery cannot relieve against this unfortunate and unjust situation.

I will advise a decree dismissing the bill.

DAVID O. WATKINS, commissioner of banking and insurance,

v.

STATE MUTUAL BUILDING AND LOAN ASSOCIATION.

PATRICK FITZGERALD

v.

STATE MUTUAL BUILDING AND LOAN ASSOCIATION.

[Submitted April 29th, 1907. Decided May 1st, 1907.]

A receiver will not be appointed for a building and loan association in process of liquidation under *P. L. 1904 p. 44* on the mere suggestion that the trustees appointed under the act named were men who were too closely connected with the former management of the association, together with criticism as to the manner of their selection, without substantial evidence of wrong-doing.

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On bill for receiver.

Mr. Nelson Burr Gaskill, assistant attorney-general, for the complainant Watkins, and *Messrs. Joseph Kaighn, Joseph J. Summerill and Ralph E. Lum*, for the complainant Fitzgerald.

Mr. Edward A. Armstrong, for the defendant.

LEAMING, V. C.

I have determined not to appoint a receiver at this time. There is no evidence before me from which I can properly conclude that the interests of creditors or stockholders require it. Suggestions have been made that the trustees are men who are too closely connected with the former management of the association, and the manner of their selection is also criticised. These suggestions carry the implication that irregularities may exist which the trustees will not be free to expose. It is manifestly improper for me to base my action upon such suggestions in the absence of some substantial evidence or positive assertion of facts. I shall assume that the trustees named will do their whole duty until I am judicially informed of matters which justify a different assumption.

The bills will be retained and a receiver may be applied for at any time the necessity can be made apparent.

Creditors and stockholders will be privileged to examine the books of account and papers of the association, and may employ accountants for that purpose if it is thought desirable.

*2 Buch.**Curtice Brothers' Co. v. Catts.*

CURTICE BROTHERS' COMPANY

v.

JAMES E. CATTS et al.

[Submitted April 2d, 1907. Decided May 3d, 1907.]

Where no adequate remedy at law exists, specific performance of a contract by defendants will be decreed on their refusal to sell tomatoes grown on certain land, as agreed, where it leaves the company helpless, except to whatever extent an uncertain market may supply the deficiency.

On final hearing, pleading and proofs.

Complainant is engaged in the business of canning tomatoes and seeks the specific performance of a contract wherein defendant agreed to sell to complainant the entire product of certain land planted with tomatoes. Defendant contests the power of this court to grant equitable relief.

Mr. Jonathan W. Acton, for the complainant.

Mr. William T. Hilliard, for the defendants.

LEAMING, V. C.

The fundamental principles which guide a court of equity in decreeing the specific performance of contracts are essentially the same whether the contracts relate to realty or to personalty. By reason of the fact that damages for the breach of a contract for the sale of personalty are, in most cases, easily ascertainable and recoverable at law, courts of equity in such cases withhold equitable relief. Touching contracts for the sale of land the reverse is the case. But no inherent difference between real estate and personal property controls the exercise of the jurisdiction. Where no adequate remedy at law exists specific per-

formance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land. Professor Pomeroy, in referring to the distinction, says:

"In applying these principles, taking into account the discretionary nature of the jurisdiction, an agreement for the sale of land is *prima facie* presumed to come within their operation, so as to be subject to specific performance, but a contrary presumption exists in regard to agreements concerning chattels." *Pom. on Cont.* § 11.

Judge Story urges that there is no reasonable objection to allowing the party who is injured by the breach of any contract for the sale of chattels to have an election either to take damages at law or to have a specific performance in equity. 2 *Story Eq. Jur.* (13th ed.) § 717a. While it is probable that the development of this branch of equitable remedies is decidedly toward the logical solution suggested by Judge Story, it is entirely clear that his view cannot at this time be freely adopted without violence to what has long been regarded as accepted principles controlling the discretion of a court of equity in this class of cases. The United States supreme court has probably most nearly approached the view suggested by Judge Story. In *Mechanics Bank of Alexandria v. Seton*, 1 *Pet.* 299, 305, Mr. Justice Thompson, delivering the opinion of that court, says: "But notwithstanding this, distinction between personal contracts for goods and contracts for lands is to be found laid down in the books as a general rule, yet there are many cases to be found where specific performance of contracts relating to personalty have been enforced in chancery, and courts will only view with greater nicety contracts of this description than such as relate to land." See, also, *Barr v. Lapsley*, 1 *Wheat.* 151. In our own state contracts for the sale of chattels have been frequently enforced and the inadequacy of the remedy at law, based on the characteristic features of the contract or peculiar situation and needs of the parties, have been the principal grounds of relief. *Furman v. Clark*, 11 *N. J. Eq.* (3 *Stock.*) 306; *Cutting v. Dana*, 25 *N. J. Eq.* (10 *C. E. Gr.*) 265, 271; *Rothholz v. Schwartz*, 46 *N. J. Eq.* (1 *Dick.*) 477, 481; *Gannon v. Toole* (*N. J. Eq.*), 32

*2 Buch.**Curtice Brothers' Co. v. Catts.*

Atl. Rep. 702; Hurd v. Groch, 51 Atl. Rep. 278 (N. J. Eq.); Duffy v. Kelly, 55 N. J. Eq. (10 Dick.) 627, 629; Law v. Smith, 68 N. J. Eq. (2 Robb.) 81.

I think it clear that the present case falls well within the principles defined by the cases already cited from our own state. Complainant's factory has a capacity of about one million cans of tomatoes. The season for packing lasts about six weeks. The preparations made for this six weeks of active work must be carried out in all features to enable the business to succeed. These preparations are primarily based upon the capacity of the plant. Cans and other necessary equipments, including labor, must be provided and secured in advance with reference to the capacity of the plant during the packing period. With this known capacity and an estimated average yield of tomatoes per acre the acreage of land necessary to supply the plant is calculated. To that end the contract now in question was made, with other like contracts, covering a sufficient acreage to insure the essential pack. It seems immaterial whether the entire acreage is contracted for to insure the full pack, or whether a more limited acreage is contracted for and an estimated available open market depended upon for the balance of the pack; in either case a refusal of the parties who contract to supply a given acreage to comply with their contracts leaves the factory helpless except to whatever extent an uncertain market may perchance supply the deficiency. The condition which arises from the breach of the contracts is not merely a question of the factory being compelled to pay a higher price for the product; losses sustained in that manner could, with some degree of accuracy, be estimated. The condition which occasions the irreparable injury by reason of the breaches of the contracts is the inability to procure at any price at the time needed and of the quality needed the necessary tomatoes to insure the successful operation of the plant. If it should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to assume to interfere, but the very existence of such contracts proclaims their necessity to the economic management

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of the factory. The aspect of the situation bears no resemblance to that of an ordinary contract for the sale of merchandise in the course of an ordinary business. The business and its needs are extraordinary in that the maintenance of all of the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant. The breach of the contract by one planter differs but in degree from a breach by all.

The objection that to specifically perform the contract personal services are required will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restrained from selling the crop to others, and, if necessary, a receiver can be appointed to harvest the crop.

A decree may be advised pursuant to the prayer of the bill.

By reason of the manner in which the facts on which this opinion is based were stipulated, no costs will be taxed.

ORLANDO KELSEY and MARY KELSEY

v.

SARAH DILKS et al.

[Submitted May 6th, 1907. Decided May 7th, 1907.]

A petition to open a final decree for error apparent in the record must be brought within the time allowed for an appeal or writ of error, where the complainant has been under no disability during that period.

On petition to open final decree.

Mr. Timothy J. Middleton and Mr. John J. Crandall, for the petitioners.

Mr. J. Boyd Avis, for the defendants.

2 Buch.Kelsey v. Dilks.

LEAMING, V. C.

I am unable to extend to petitioner the relief which she seeks. The petition is to open a final decree which was enrolled more than three years ago. Petitions of this nature have in this jurisdiction largely superseded bills of review and the simplicity of the procedure goes far to recommend it. *Kearns v. Kearns*, 70 N. J. Eq. (4 Robb.) 433; *White v. Smith*, 72 N. J. Eq. (2 Buch.) 697. But the principles which control the court in granting or withholding relief appear to remain unchanged. I am unable to find any authority to justify a departure from these well-established principles. It has been uniformly held in England and in the American states that a bill of review for error apparent in the record must be brought within the time allowed for an appeal or writ of error in all cases where the complainant has been under no disability during that period. *Story Eq. Pl.* § 410; *Dan. Ch. Pl. & Pr.* § 1580 and note; *3 Encycl. Pl. & Pr.* 583; *Fletch. Eq. Pl. & Pr.* § 932; *1 Fost. Fed. Pr.* § 354. No reason suggests itself for a departure from this rule where the relief is sought by petition instead of by bill of review.

In the case at bar the relief sought is based wholly upon matters of record. No newly-discovered evidence is claimed. It is claimed that the court erred in excluding certain evidence and that the pleadings do not justify the decree entered. These are matters touching which the law defines the period of three years for review by appeal, and that period has been uniformly adopted as a period beyond which a bill of review cannot be entertained, except for newly-discovered evidence or in cases of disability.

I am obliged to discharge the order to show cause and dismiss the petition for the reasons stated.

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CHARLES A. WILSON

v.

ROY F. ANTHONY et al.

[Submitted April 30th, 1907. Decided May 2d, 1907.]

The fraud in obtaining a foreign judgment for which equity will enjoin execution of a domestic judgment founded on the foreign judgment does not relate to the cause of action, or to evidence adduced before the foreign court, but to deception and downright fraud in procuring jurisdiction, or in preventing defendant, by fraudulent means, from presenting his defence.

On motion for an injunction to restrain the execution of a judgment at law.

On June 7th, 1904, one Samuel L. Bailey recovered a judgment by default against the complainant, Wilson, in the supreme court of the State of New York for \$1,594.31. This judgment was assigned to the defendant Anthony, who brought suit thereon in the New Jersey supreme court. Wilson pleaded to the action that he had not been served with process in the New York suit, and the action was tried upon this issue before the chief-justice and a jury on April 10th, 1906. There was a verdict for the plaintiff and an affirmance of the judgment entered thereon by the court of errors and appeals, the judgment being finally entered for \$1,845.55. Wilson, in May, 1906, after the verdict in the New Jersey action, moved the New York supreme court to set aside the judgment. This motion was heard in October, 1906, and, as was stated on the argument, was denied on the ground of laches. Again, in 1907, Wilson made a second motion in the New York supreme court to set aside the service of the summons in that action and the judgment consequent thereon, which motion was likewise denied.

The complainant now comes to this court with a bill praying

2 Buch.Wilson v. Anthony.

that Anthony & Bailey may be enjoined from enforcing payment, not only of the New Jersey judgment, but of the New York judgment as well, on the ground of fraud.

The fraud set out in the bill consists of allegations—*first*, that Wilson was not served with process in the New York suit; *second*, that the complaint there was withheld from the files until the day the judgment was entered, and *third*, that Bailey made a false affidavit to the complaint.

The complaint charges Wilson with an indebtedness of \$1,300 for two thousand bushels of corn and the husks and stalks on which the same was grown, and the affidavit verifies the complaint that the same is true to the plaintiff's own knowledge.

Mr. Frank E. Bradner, for the complainant.

Mr. Andrew Van Blarcom, for the defendants.

HOWELL, V. C.

The jurisdiction of this court to interfere with the enforcement of judgment at law is undoubted and is not questioned by the defendants. The cases on the subject in our own state are so numerous that they cannot all be alluded to. In this case the court is asked to enjoin enforcement of a domestic judgment for the reason that the foreign judgment, which was its foundation, was obtained by fraud.

Mr. Justice Gummere, now chief-justice, in *Fairchild v. Fairchild*, 53 N. J. Eq. (8 Dick.) 678, says:

"Can this judgment rendered by a court which has jurisdiction over the parties and over the subject-matter of the litigation be ignored by the courts of this state notwithstanding the prescription of the constitution of the United States? * * * It seems to me not, for, while this constitutional provision and the federal statutes referred to have been the subject of more or less diversity of judicial opinion, it is now entirely settled that the only grounds upon which the judgment of a court of general jurisdiction can be disregarded in another state are—*first*, where the adjudging tribunal had no jurisdiction over the person

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against whom judgment was pronounced, or over the subject-matter of the litigation, and *second*, where the adjudication of the foreign tribunal has been obtained by fraud."

Is the fraud alleged in the bill of complaint such fraud as is required by the decision in *Fairchild v. Fairchild* to override the judgment in question?

As to the first allegation, viz., that there was no service of process in the foreign jurisdiction, it is sufficient to say that it appears by the bill that this has already been adjudicated against the complainant not only in our supreme court but in our court of errors and appeals, and twice in New York in the original suit, and on the argument complainant's counsel felt compelled to admit that he must discuss the case as if service had been undoubtedly made upon the complainant in New York. Neither do I think that the complainant can avail himself of the withholding of the complaint from the files until the entry of the judgment. I think we must assume, in the absence of evidence to the contrary, that the mere procedure which resulted in the entry of the judgment in the New York court was regular and in accordance with the law of that state.

I am quite as confident that the third cause of complaint has as little foundation in law as the other two.

A careful examination of the affidavits submitted with the bill, taken in connection with the facts disclosed by the defendants' affidavits, does not satisfy me that there was any fraud practiced by Bailey. Neither am I convinced by these depositions that Wilson had a clear and unmistakable defence to the action in New York. But suppose there was a defence made out, it could not avail Wilson unless he could also show fraud. How then does the case stand?

An attempt was made to convince this court of the fact of fraud by offering to show that the New York judgment was unjust; that instead of a judgment for the plaintiff therein the real fact was that the balance of account was in favor of the defendant, and that the judgment was therefore the product of false evidence, in short, of perjury.

"To secure the interference of equity it will not suffice to show that injustice has been done by the judgment against which

2 Buch.Wilson v. Anthony.

relief is sought; it must appear that the party has an equitable defence of which he could not avail himself at law or had a good defence at law of which he was ignorant until after the time for making defence at law had passed, or that he was prevented from making his defence by fraud or artifice of his adversary, or by fraud, accident or mistake unmixed with any negligence of his own, or that his ground of interference is a matter of pure equity cognizance." *Brick v. Burr*, 47 N. J. Eq. (2 Dick.) 189 (*Vice-Chancellor Green*).

Similar language was used by the court in *Mechanics Bank v. Burnet Manufacturing Co.*, 33 N. J. Eq. (6 Stew.) 486. There the allegations were non-service of process and no indebtedness. The court refused to consider these grounds, but enjoined the judgment on another ground.

There is no allegation here that the plaintiff in the New York suit in any way prevented the defendant from making his defence there. The fact of service has been adjudicated against him. He had his opportunity to make his defence which he neglected to avail himself of, and now no mere allegation that the judgment is for too large an amount can move a court of equity. In fact, a judgment obtained by perjured testimony, without other matters of equitable cognizance, could not avail the complainant on this motion.

Chancellor Kent so held in *Smith v. Lowry*, 1 Johns. Ch. 320, and this case has been approved on this point in *Cairo and Fulton Railroad Co. v. Titus*, 27 N. J. Eq. (12 C. E. Gr.) 102; *Hannon v. Maxwell*, 31 N. J. Eq. (4 Stew.) 318, and *Dringer v. Receiver*, 42 N. J. Eq. (15 Stew.) 573, where Vice-Chancellor Van Fleet approves of the statement made by Mr. Justice Miller in *United States v. Throckmorton*, 98 U. S. 61.

"The acts for which a court of equity will, on account of fraud, set aside or annul a decree between the same parties rendered by a court of competent jurisdiction have relation to frauds extrinsic and collateral to the matter tried by the first court and not to a fraud in the matter on which the decree was rendered."

Great stress was laid on the argument by complainant's counsel on two recent English cases; *Abouloff v. Oppenheimer*, 10 Q. B.

Div. 295 (1832), and *Vadala v. Lawes*, 25 Q. B. Div. 310 (1890), were, respectively, actions at law upon foreign judgments, one rendered by a Russian court and the other by an Italian court, and in each case it was held that the English courts would inquire into the fact of perjury committed in the original action. If they have any pertinence whatever to the matters in controversy here they show that when the New York judgment was sued upon in the New Jersey supreme court the defence of fraud might have been set up and litigated, and that therefore the complainant is barred from again raising this issue.

These cases are severely criticised by Judge Wallace in the circuit court of the United States for the southern district of New York, in *Hilton v. Guyott*, 42 Fed. Rep. 249, as being in conflict with the *Throckmorton Case* above cited, which has been so strongly approved in this state, and for the further reason that the authorities cited do not sustain the proposition. In my opinion they must be held to have engrafted on the *Duchess of Kingston's Case* (2 Sm. Lead. Cas.) a modification of the rule there laid down, which does not appear ever to have been hinted at in our courts.

I therefore conclude that the fraud referred to in *Fairchild v. Fairchild*, *supra*, does not and cannot relate to the cause of action or to evidence adduced before the court in the foreign jurisdiction, but does relate to deception and downright fraud in procuring jurisdiction or in preventing the defendant by fraudulent means from presenting his defence. And inasmuch as the case does not show any fraud in the institution of the suit or in obtaining jurisdiction, or that the defendant was in any way hindered by the plaintiff from appearing and defending the action, or from producing such witnesses as had knowledge of the facts, the injunction prayed for must be denied.

2 Buch. United States Fidelity and Guaranty Co. v. Newark.

UNITED STATES FIDELITY AND GUARANTY COMPANY

v.

CITY OF NEWARK et al.

[Submitted May 14th, 1907. Decided May 18th, 1907.]

1. *P. L. 1892 p. 369*, creating a lien on funds due public contractors for the benefit of laborers and materialmen, and providing for the enforcement of such lien, does not contemplate an action in the chancery court by the original contractor against the municipality.

2. *P. L. 1892 p. 369* creates a lien on funds due municipal contractors for the benefit of laborers and materialmen, which sections 1 and 5 declare shall extend to the full extent of the claim or demand and to the extent of the liability of the contractor for the claim preferred.—*Held*, that a proceeding to enforce such lien was a proceeding *in rem* limited to a determination of the lien claims against the contractors, and to the application of the funds due the contractors from the municipality to the extent necessary to pay such liens, or if the fund is insufficient, then to distribute the same among the lienors *pro rata*.

3. In a suit to enforce a lien on an amount due a municipal contractor, given by *P. L. 1892 p. 369*, the court has no jurisdiction to entertain a cross-bill by the contractor's representatives for the purpose of an accounting between such representatives and the municipality.

On motion to strike out cross-bill.

Mr. Francis Child, Jr., and *Mr. Herbert Boggs*, for the motion.

Mr. Sherrerd Depue, contra.

HOWELL, V. C.

On August 15th, 1901, the city of Newark entered into a contract with Stewart & Abbott for the construction of a reservoir at Cedar Grove, in the county of Essex. A portion of the work provided for therein was sub-contracted a few days later to James Seme. Seme gave a bond to Stewart & Abbott conditioned for the due performance of his sub-contract, and the complainant, a

Maryland corporation which is engaged in the surety business, became surety to Stewart & Abbott thereon.

In June, 1903, Seme discontinued work under his sub-contract, and thereupon, in pursuance of a condition in the bond, the surety company, with the assent of Stewart & Abbott, undertook to finish Seme's contract, and this they claim they have now fully performed. On December 10th, 1904, Stewart & Abbott, so the bill claims, were indebted to the complainant for labor and materials furnished by it in the performance of the Seme contract in the sum of thirty-five thousand and odd dollars, which they refused to pay, and thereupon on that day it took steps under the Municipalities Lien law to obtain a lien on the moneys owing by the city of Newark to Stewart & Abbott. The bill alleges that at the time it was filed the city of Newark owed Stewart & Abbott several distinct and separate amounts of money arising out of the contract, which aggregated upwards of \$135,000.

Some time in December, 1904, and, as the bill alleges, after the filing of the lien claim, the members of the firm of Stewart & Abbott transferred and assigned to James C. Stewart and Alexander M. Stewart the moneys due and to grow due under their contract. The bill claims that this assignment was subject to the complainant's lien claim.

In the meantime John L. Stewart, a member of the firm of Stewart & Abbott, died, leaving a will by which he appointed Alexander M. Stewart and James C. Stewart as executors thereof. The defendants are (1) the city of Newark, (2) the board of street and water commissioners of Newark, (3) Frederick W. Abbott, surviving partner of Stewart & Abbott, (4) James C. Stewart and Alexander M. Stewart, assignees of Stewart & Abbott, (5) John C. Stewart and Alexander M. Stewart, as executors of the will of John L. Stewart, deceased, (6) the Empire State Granite Company, another lienor.

The prayer is for a decree adjudging the validity of the complainant's lien and directing the city to pay over to the complainant the amount claimed therein out of the funds due or to become due from the city to Stewart & Abbott or their assignees, with interest and costs.

2 Buch. United States Fidelity and Guaranty Co. v. Newark.

The city of Newark and the board of street and water commissioners answered this bill admitting the Stewart & Abbott contract and stating upon information and belief the Seme sub-contract and the suretyship of the complainant thereon, but neither admit nor deny the relations between Seme and the surety company or between the surety company and Stewart & Abbott, and claim that they have no knowledge of the amount of money owing to the complainant by Stewart & Abbott. They deny that they have in hand the moneys claimed in that behalf in the bill, but say that there would be considerable money due to Stewart & Abbott under their contract with the city if they had performed all their obligations thereunder; that they had incurred large penalties and deductions from the contract price would have to be made, and that there would then be little, if anything, due to them on account of their contract.

In the twelfth paragraph of the answer the city uses this language:

"It submits to this court the question of how much, if anything, is due by the city of Newark or from the city of Newark to the said Stewart & Abbott, or to their assignee, or to this complainant, or to any person entitled to receive the same."

An answer was also filed by Frederick W. Abbott, surviving partner, and James C. Stewart and Alexander M. Stewart as executors and assignees. They admit the Stewart & Abbott contract, the Seme sub-contract, the bond of Seme and the surety company, Seme's abandonment of the work, its performance by the surety company, the filing of the alleged lien, the indebtedness of the city of Newark in large amounts to Stewart & Abbott, the assignment of the moneys due to James C. Stewart and Alexander M. Stewart, claiming that the assignment was made before the filing of the lien claim by the complainant, but they deny that Stewart & Abbott were indebted to the complainant in the sum of \$135,000, or any other sum, or that the surety company acquired any lien upon any moneys due from the city of Newark, and they set out in detail the series of transactions and settlements between Stewart & Abbott and Seme and the surety company, and claim that the surety company is indebted to

Stewart & Abbott, or the persons who now represent them, in a large amount of money. They then exhibit their cross-bill against the surety company, setting up the transactions between Stewart & Abbott and their representatives on the one hand and Seme and the surety company on the other hand, and pray for an accounting of these transactions, and that the court may by its decree direct the surety company to pay to the answering defendants whatever may be found due on such an accounting.

This answer was subsequently amended by adding thereto at the conclusion of the cross-bill embodied therein another cross-bill separate and distinct from the one above mentioned, exhibited against the city of Newark and the board of street and water commissioners and the surety company (the complainant) the object and purpose of which is to charge the city of Newark with a large amount of work as extra work in addition to that provided for in the original contract of 1901, the prayer being that an accounting may be taken of the moneys due from the city of Newark and the board of street and water commissioners to Stewart & Abbott's present representatives, and that a decree be made directing the city to pay them the amount found due upon such an accounting, including interest.

This cross-bill, however, admits and claims in paragraph 45 thereof that, in addition to this claim for extra work which first appears in this cross-bill, the city of Newark owes to Stewart & Abbott's representatives large sums of money due under said contract which have not been paid over by it, the exact amount of which is unknown to them, but which they believe to be upwards of the sum of \$132,000. There is no prayer in the bill for any discovery or other specific relief.

A motion is now made on behalf of the city of Newark under the two hundred and thirteenth rule to strike this last-mentioned cross-bill from the files, for the following reasons:

First. Because the cross-bill is multifarious in that it seeks different forms of relief against the complainant and the defendant, the city of Newark.

Second. Because the bill is filed under the Municipalities Lien law which creates a purely statutory jurisdiction, and there is no provision for affirmative relief of the nature prayed for.

2 Buch. United States Fidelity and Guaranty Co. v. Newark.

Third. Because the cross-complainants have a complete and adequate remedy at law.

The only cross-bill that the moving defendant (the city of Newark) is interested in is the one that was brought into the case by the amendment above mentioned, and the only relief prayed thereby is that the city of Newark and the board of street and water commissioners may account to the Stewart & Abbott representatives for the extra work mentioned therein, and that a decree be made directing the city to pay the amount so found due. There appears to be no particular relief sought against the complainant. This being the situation, I shall discuss the motion without reference to the subdivisions of the reasons stated in the notice.

It will be well to begin by a consideration of the statute which authorizes the suit to be brought; it must be remembered that the proceeding is wholly statutory and can be in touch with the ordinary systematic methods of the court of chancery only at the point of procedure. Beyond mere procedure the rights, duties and liabilities of the parties are regulated by the statute. This act (*P. L. 1892 p. 369*) has its object expressed in the title. It is an act to secure to laborers and materialmen payment of moneys due to them for labor or materials furnished by them toward the performance of public works. It does not contemplate an action in this court by an original contractor against the municipality. Its office is merely to create a lien in favor of subcontractors, laborers and materialmen and to provide the means for foreclosing the same. It was largely on this ground that the court of errors and appeals held that the court of chancery alone had jurisdiction to entertain suits under the act. *DeLafield Construction Co. v. Sayre*, 60 N. J. Law (31 Vr.) 449. As I read the statute the office of a suit under it is—*first*, to ascertain whether a lien has been formally perfected by proper filing and service of notices; *second*, whether sufficient money earned or to be earned under the contract remains on which the lien can fasten; and *third*, an ascertainment of the amount due on the lien and a decree against the municipality for that amount.

The reason and spirit of the act in my opinion will be satisfied by inquiring in this action, not how much money is actually due

from the municipality to the contractor, but whether sufficient money remains to meet the liens which shall be established. There seems to be no reason for pushing the inquiry beyond this point, and no reason for entertaining a litigation between the parties to the original contract excepting for the purpose of providing for the established liens.

The court of errors and appeals in the case just cited declares that there is no provision for a personal judgment against the contractor as a debtor, but that the right of the claimants to obtain such judgments against him in other actions is expressly preserved.

In *Garrison v. Borio*, 61 N. J. Eq. (16 Dick.) 236, Vice-Chancellor Grey declined to enter a personal decree against the lienor on a lien preferred under the act in question.

It is quite clear that the statute did not mean to authorize this court to make a final and determinative adjudication between the municipality and the contractor, but meant to have the inquiry go so far only as to ascertain whether there remained a sufficient amount of contract-money to pay the liens which are found to be valid liens. When we consider that the action to determine or terminate the lien may be brought by the contractor or by the municipality as well as by the claimant, and that their separate actions may be consolidated, and that the complainants' right to bring personal actions in other courts is preserved, we can readily see that the proceeding was intended to be a proceeding *in rem*, much like the proceeding for the foreclosure of a pledge or mortgage, and resembling in many of its features the ordinary bill of interpleader.

Again, the nature and extent of the lien created by the statute is another argument in favor of this view. Sections 1 and 5 describe these qualities and give a lien, not on the whole fund necessarily, but "to the full extent of such claim or demand" and "to the extent of the liability of the contractor for the claim preferred." These are limitations upon the extent of the lien, and, inasmuch as this court can only foreclose to that extent, it would seem as if the jurisdiction of the court must stop at that point.

2 Buch. United States Fidelity and Guaranty Co. v. Newark.

In *Norton v. Sinkhorn*, 63 N. J. Eq. (18 Dick.) 313, the court of errors and appeals held that the proceeding was *in rem*; that it was a controversy over a particular fund involving only the amount due to the contractor from the owner and the amount due to the lien claimants respectively.

Chief-Justice Depue says (at p. 318):

"Where the amount due to the contractor is undisputed the sole question for adjudication is the amount due to the lien claimants, respectively, from the contractor; when that has been ascertained then the function of the court is to apportion the amount due the contractor among the lien claimants in the proper proportion, provided the fund under the control of the court is sufficient to answer that purpose; if not sufficient, then *pro rata* until the fund in hand is exhausted. At this stage the jurisdiction of the court under the statute ends. No personal judgment, either for or against a lien claimant, can be given, nor does the statute provide for a judgment against a municipality in case the amount due to the contractor exceeds the sums due to the lien claimants."

This being the nature of the proceeding, how stands the cross-bill with relation to it? A cross-bill is a mode of defence to the original suit and in its subject-matter it must be confined to the scope of the original cause of action and to the defence set out in the answer of the cross-complainant. In this case the cross-bill is not intended for any such purpose. To say that the city of Newark owes more than enough money to pay the liens described in the bill is no defence to the original suit. Such an allegation in a cross-bill does not aid in elucidating the problems raised by the original bill. The admission or claim in the cross-bill that the city owes more than enough to pay the alleged liens shows this in the most conclusive manner. In effect the cross-complainant comes into court saying there is money enough in the city treasury to pay all these so-called liens if they shall be established as such, and, according to our calculation, much more than enough, but we desire that the court shall go beyond the purview of the original suit and ascertain for us the amount of this excess and try out all the difficult questions which are raised

by the cross-bill in connection therewith, and ascertain for us the amount of this excess, and give us a decree and execution therefor. In other words, the cross-complainant comes into court asking for a decree *in personam* in a statutory suit which provides only for a remedy *in rem*.

If no money decree *in personam* can be made in this proceeding against the contractor, nor against the lienor, on the ground that the proceeding is one *in rem*, it is difficult to see how the court can make a money decree in favor of the cross-complainant against the municipality. In fact, Chief-Justice Depue, in the opinion just quoted, declares against the proposition.

In the *Norton Case* in chancery (61 N. J. Eq. (16 Dick.) 508), also before Vice-Chancellor Grey, Norton, the sub-contractor, who had furnished stone for a road which was being built by Sinkhorn & Walton in Mercer county, filed a bill to enforce a lien under the Municipalities Lien law. Sinkhorn answered that Norton had so delayed his performance of the stone contract that he was subjected to a loss in completing the work. He also filed a cross-bill against Norton claiming that the amount of loss was such that he was obliged to pay a greater sum than was coming to Norton and for the excess he prayed, by way of cross-bill, for a decree *in personam* against Norton. Norton then moved under rule 213 to strike this defence from the answer, and also to strike out the whole of the cross-bill which sought affirmative relief against him. The vice-chancellor struck out the cross-bill upon the ground that there was no provision for a personal judgment against the claimant, citing *Delafield v. Sayre, supra*, as an interpretation of a doubtful statute. He declared that this case had established a mode of procedure which had been followed, and that inasmuch as the cross-bill was wholly dependent for its support upon an interpretation of the statute that there might be a personal decree against the sub-contractor for the balance due from him, he struck out the whole cross-bill.

Coming on to the parts of the answer setting up the same defences practically, he struck out those also; the court of errors and appeals in 18 Dick. 313, modifying the decree below, held that the cross-bill was properly stricken out, but that the answer should have been allowed to stand.

2 Buch. United States Fidelity and Guaranty Co. v. Newark.

Leaving now out of consideration the question of procuring a personal decree in favor of the Stewart & Abbott representatives against the city of Newark, and omitting that portion of the prayer from the cross-bill, what is left amounts to a prayer for accounting. The cross-bill is not necessary to procure an accounting. All the relief which can be had under any prayer for an accounting can be had on the original bill and answers, so that the cross-bill is not only entirely unnecessary, but is worse than useless, because it adds to the expense and delay of finally adjusting the issues presented. *Johnson v. Buttler*, 31 N. J. Eq. (4 Stew.) 36; *Scott v. Lalor*, 18 N. J. Eq. (3 C. E. Gr.) 301.

It was argued against the motion that the submission by the city to this court of the question of the amount due by it on the contract was practically a consent that the court might take jurisdiction of all the matters in difference disclosed by the cross-bill.

I do not think that this statement in the answer should have any such broad construction. Manifestly what the city meant to do was to submit the issues raised by bill and answer, and, indeed, I do not think it could go so far as to admit a jurisdiction under the statute in question to make a decree not contemplated by it.

If my interpretation of the statute is correct this court, notwithstanding the submission, would still be without power to act, because it has no jurisdiction over the subject-matter. The cases cited in the cross-complainant's brief on this point are all cases in which the court has undoubted jurisdiction over the subject-matter.

My conclusion, therefore, is that the cross-bill must be stricken from the files.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1907.

WILLIAM J. MAGIE, ORDINARY.
JAMES J. BERGEN, VICE-ORDINARY.

In the matter of the estate of ISAAC R. VREELAND, deceased.

[Decided February 27th, 1907.]

A will construed and held not to give to the testator's son, as life tenant, by implication, the rents of a certain tract of land.

On appeal from Bergen county orphans court.

Mr. Raymond P. Wortendyke and *Mr. Robert L. Lawrence*,
for the appellants.

Mr. Milton Demarest, for the respondents.

BERGEN, VICE-ORDINARY.

The seventh paragraph of the last will of Isaac R. Vreeland, deceased, reads in part as follows: "Upon the decease of my son, John Vreeland, I give and devise to my granddaughter, Mary Vreeland, her heirs and assigns forever," a tract of land particularly described in the paragraph.

Since the probate of the will the executors named therein have collected the rents, issues and profits arising from this land, and in an intermediate account of their dealings with the estate have charged themselves therewith as a part of the general funds in their hands. To this appropriation of such rents testator's son, John, has filed an exception, claiming that he is entitled to the rents as life tenant, not by express gift, but by implication. The orphans court determined that a life estate could not be implied, and, from its decree so adjudging, this appeal was taken. The testimony heard by the orphans court has not been brought here as a part of the record, and the case has been submitted upon the will alone. As the estate set up must be implied from the intent of the testator, to ascertain which the entire will must be considered, a brief analysis of a part of it is required.

The sixth item devises to John Vreeland, a son, a life estate in a part of testator's lands particularly described, with remainder to Isaac R. Vreeland, Jr., a grandson, and directs that the executors shall, during the life estate, "keep all the buildings on said land in repair, and pay all taxes and assessments thereon out of the income arising from my estate." Item eight empowers the executors, should John cease to occupy the lands, to take control thereof, and "apply all income arising therefrom in the manner directed by me in the following item of this my will." By the ninth item the testator gave and devised "all my other estate, both real and personal, of which I may die seized or possessed or be entitled to, to my executors" upon certain trusts, viz.: To manage, control and invest; to receive the rents, issues and profits; to keep the buildings in repair and insured, and from the income to make certain payments to wit: To the grandson, Isaac, \$300 a year; to Mary Vreeland, a granddaughter, \$100 a year during the lifetime of his son, John; to Anna A. Dourman \$300 a year during her life; to expend for the support of his son,

2 Buch.Vreeland's Case.

John, and his family, during John's life, a sum not exceeding \$1,200 a year. By item ten the testator gave at the death of his son, John, all of his "estate then remaining, and all accumulations thereof" to the children of his son, John. Item twelve confers upon the executors a power of sale as to all of testator's real estate, except the tracts described in items five, six and seven.

Where implications are allowed to raise an estate, they must be necessary to carry out the testator's intentions; conjectural or possible implications are not sufficient, and a necessary implication should be of such a character as to indicate "so strong a probability of intention, that an intention contrary to it, which is imputed to a testator, cannot be supposed." *Rep. Leg. 81; McCoury's Executors v. Leek, 14 N. J. Eq. (1 McCart.) 70.*

The appellants insist that under paragraph seven the testator intended to give to his son, John, a life estate in the lands described in that paragraph, with remainder to his granddaughter, Mary Vreeland, and that no other intention than that which they impute to the testator can be supposed, otherwise the testator died intestate as to a portion of his estate in the lands mentioned in item seven, he not having, as they argue, made any disposition of the estate remaining therein prior to the gift to Mary Vreeland, which was not to vest until after the death of John.

The difficulty with the argument of the appellant is that it is founded upon a false premise, for by the ninth section of this will the testator devised to his executors in trust all "my other estate, both real and personal, of which I may die seized or possessed, or be entitled to." This language is sufficiently broad to cover all of testator's estate, including all interest therein not theretofore disposed of, and would include the lands mentioned in item seven, subject to the gift to Mary Vreeland, to take effect after the death of John, and a clause of this nature will, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for implication. *2 Jarm. Wills 121.* Nor am I able to perceive, after an examination of all of the provisions of this will, any contrary intention indicated by the testator. In the next preceding section of his will he has expressly given to John a life estate in the lands devised by it, and if he intended to confer upon John a life estate

in the lands devised by item seven, he would naturally have followed the express language used in item six; on the contrary, he makes no disposition in section seven of any interest in the land devised by it until after the death of John, and with the prior estate remaining, after the gift to Mary, yet undisposed of, he, in item nine, devises the residue of his estate to his executors in trust. The executors were to hold the estate, not otherwise disposed of, and apply a part of the income towards the support of John and his family during his life, and in my opinion it was the plain intention of the testator that his executors and trustees should take the income from the lands given to Mary, which might accrue during the life of John, and apply it to the carrying out of the trusts established by the ninth paragraph.

My conclusion is that the testator did not leave any estate in the lands in question undisposed of, and that we are not justified in raising, by implication, a life estate in the appellant.

The decree below will be affirmed, with costs.

In the matter of the estate of ELIZABETH V. MANNERS.

[Argued February 6th, 1907. Decided May 14th, 1907.]

1. The *prima facie* effect of a perfect attestation clause appended to a paper propounded for probate as a will may be overcome by evidence.

2. By the testimony of the attesting witnesses, it appeared that the paper was not signed by the alleged testatrix in their presence; that when they entered the room where she was, the scrivener who had drawn the paper said in an audible voice that she had made her will and wanted them to witness it, and added "this is her name;" that the alleged testatrix was silent and made no sign of assent to either of the scrivener's statements.—*Held*, that there was no sufficient proof of publication of the paper as a will or of an acknowledgment of the making of the signature thereto by the alleged testatrix to satisfy the requirement of the statute.

On appeal from a decree of the Hunterdon county orphans court.

2 Buch.Manners' Case.

Mr. Arthur R. Denman, for the appellant.

Mr. Paul A. Queen, for the respondent.

MAGIE, ORDINARY.

The appeal is from a decree refusing probate to a paper-writing offered as the last will and testament of Elizabeth V. Manners. The paper-writing purported to be signed by the testatrix. There was a perfect attestation clause, to which was appended the signatures of two witnesses, and these witnesses were called and testified on the application for probate.

The perfect attestation clause appended to the will was *prima facie* evidence of due execution. The *prima facie* effect of such a clause, however, may be overcome by testimony, and even by the testimony of the subscribing witnesses. *Berdan's Case*, 65 N. J. Eq. (20 Dick.) 681.

The questions presented are—*first*, whether their testimony overcomes the declaration of the attestation clause of the will as to publication by the testatrix; and *second*, whether their testimony overcomes the attestation clause in respect to the signature of the will.

The evidence renders it clear that the signature was not made in the presence of the subscribing witnesses. When they entered the room in which the testatrix sat they found there the scrivener who had drawn the will and who had requested them to come into the house to witness its execution. Thereupon the scrivener said that the testatrix had made her will and wanted them to witness it. The witnesses expressed the opinion that this was spoken in a voice loud enough to be heard by the testatrix, who sat some eight or ten feet distant in the same room, but they both declare that she made no sign of assent, and both agree that she did not sign the paper in their presence.

It is settled law that a testatrix may publish a will by assenting to a statement made in her presence. Such an assent may be made by some act or sign. If the scrivener declared, in the hearing of the testatrix, that the paper was her will and she had then signed it, publication might be inferred. But when there was

no act or sign by the testatrix, I think that the proof discloses that there was no publication by the testatrix.

As the paper-writing was not signed in the presence of witnesses, it is, by our statute, invalid unless the testatrix acknowledged "the making thereof," *i. e.*, the making of the signature in their presence. On this subject the evidence shows that the scrivener said, apparently with reference to the paper-writing which was in the room and on the table, "This is her name." Testatrix remained silent, and no act or sign was made by her to that statement.

But if she had signified her assent to the statement of the scrivener, in my judgment the acknowledgment which the statute requires would not be made out. An acknowledgment that the signature was her name is not an acknowledgment that it was made by her, and I think nothing less than such an acknowledgment will satisfy the statutory requirements.

In my judgment, the decree refusing probate must be affirmed.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY
ON APPEAL FROM THE COURT OF CHANCERY,
AND THE PREROGATIVE COURT.

MARCH TERM, 1907.

RUDOLPH HEROLD, appellant,

v.

COLUMBIA INVESTMENT AND REAL ESTATE COMPANY et al.,
respondents.

[Argued March 26th, 1907. Decided July 8th, 1907.]

1. An owner who divides his lands into lots and streets as shown by a map filed by him with the county clerk, and who sells lots as shown thereon, does not, in the absence of a neighborhood scheme calling for the erection of but one building on a single lot, impliedly covenants not to sell the lands except in the parcels delineated on the map, but he may subdivide the lots into smaller parcels and sell them in such parcels or devote any part of the same to public uses, as streets, parks, &c.

2. An owner who divides his lands into lots and streets as shown by a map filed by him and who sells lots as shown thereon impliedly covenants with his grantees that they shall have a right of passage over

Herold v. Columbia Investment and Real Estate Co.72 Eq.

such streets as an appurtenant to the premises granted to them; and such grantees may enjoin a change in the location of or a narrowing of the width of the streets, without first showing that the same will result in depreciation of the value of the lot purchased.

On appeal from a decree in chancery advised by Vice-Chancellor Stevenson.

Messrs. Weller & Lichtenstein, for the appellant.

Messrs. Carrick & Wortendyke, for the respondents.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

The case made by the pleadings and supported by the proofs is as follows:

The defendant, the Ridgefield Land Company, was, in the year 1898, the owner of a tract of land in the county of Bergen, which it had laid out into certain lots and streets delineated upon a map of the property, which was prepared under its direction, and filed by it in the office of the clerk of the county. On the 2d of December of that year it sold to Herold, the complainant, two of the lots shown on its map, namely, lots 10 and 12 in block G. Lot 10 fronts on a street designated upon the map as Summit avenue. Lot 12 adjoins lot 10 and is located upon the corner of Summit avenue and a street designated on the map as Prospect avenue. This latter avenue is laid out on a curve, one portion of it running at right angles to Summit avenue, and another part of it running parallel to that avenue, and forms the boundary for the northerly and the easterly sides of block G.

In the year 1905 the complainant began the erection of a dwelling-house upon his two lots, the contract price for which was about \$15,000.

In the meantime the Ridgefield Land Company, after selling a large part of its lots, either singly or in parcels, had disposed of the remainder of its holdings in bulk to one Flood, who in turn conveyed the same, on the 8th of April, 1904, to a corporation known as the Industrial Savings and Loan Company.

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On the 26th of September, 1904, this company filed in the office of the clerk of Bergen county another map of the whole tract, upon which many of the lots delineated upon the original map under which the complainant purchased his property, are divided into smaller parcels. In addition an alteration is made in the location and character of certain of the streets shown on the original map, and particularly of Prospect avenue, which is altered by extending the portion which forms the northerly boundary of block G in a straight line to a public highway known as Palisade avenue, and the easterly boundary of the original tract; and, further, by narrowing from fifty to forty feet that portion of the avenue which bounds block G on the east and by renaming it Rothwell avenue.

Subsequent to the filing of this second map the legal title was passed out of the Industrial Savings and Loan Company, but the beneficial interest in the property still remains in it, the legal title being held by a trustee for its benefit. The defendant, the Columbia Investment and Real Estate Company, as the agent of the Industrial Savings and Loan Company in charge of the tract, is engaged in selling lots as delineated on the second map, and in altering Prospect avenue so as to conform to the lines and locations shown on that map.

The complainant insists that these changes from the plan exhibited by the original map, if carried into effect, will materially interfere with his enjoyment of his building; the reduction in size of the lots, by causing the erection thereon of buildings of small size and little value, and the alteration of Prospect avenue by changing it into a thoroughfare, the user of which will entirely destroy the quiet of his residence. He further insists that the changes referred to will also largely depreciate the value of his property. For these reasons he seeks, by his bill, to restrain the defendants from altering the location or width of Prospect avenue, or of any of the other streets or avenues delineated on the original map, and from selling any of the land contained in the tract, except by the lots as shown upon that map.

The complainant also seeks to restrain the defendants from violating a so-called "Neighborhood scheme," which he alleges was put in force by the Ridgefield Land Company, and became

operative throughout the whole tract delineated upon its map, and by the provisions of which but one building was permitted to be erected upon a single lot, and was required to be located a given distance from the front, rear and side lines thereof.

At the hearing of the case in the court of chancery the bill of complaint was dismissed upon the ground that the complainant's remedy, if he had one, was legal and not equitable. From the decree of dismissal this appeal is taken.

The proofs in the case fail to show the existence of any such neighborhood scheme as is alleged in the bill. It is, therefore, unnecessary for us to consider the question whether the purchaser of a number of lots, all of which have had impressed upon them a general scheme, restricting the number and location of buildings to be erected thereon, has a remedy in equity against the vendor to restrain him from selling other of his lots free from such restrictions. The failure to show the existence of such scheme is also fatal to the claim of the complainant that he is entitled to restrain the Ridgefield Land Company, and its successors in title, from selling its lands except in parcels delineated upon the original map. No such covenant is implied by the making of such a map and the sale of certain lots shown thereon, and the right of the owner to dispose of the unsold portion of his lots, singly or in bulk, or by subdividing them into smaller parcels, and selling them in such parcels, is complete. Not only may he sell the lands in such parcels as he may see fit, but he is under no obligation to his vendees to retain the unsold portion in private ownership. He may, if he sees fit, devote any part of it to public uses, either as streets, parks or in other modes of a general nature calculated to give additional value to the rest of the tract. The refusal of the court of chancery to issue its injunction, either to compel the carrying into effect of the alleged neighborhood scheme or to restrain the sale of the lands embraced in the original map in lots smaller in area than those shown thereon, was, therefore, justified.

But the attempt of the defendants to alter the location and narrow the width of certain of the streets delineated on the original map is clearly an infringement of the rights of the complainant, and for the protection of such rights he is entitled to the

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aid of a court of equity. In the case of *Lennig v. Ocean City Association*, 41 N. J. Eq. (14 Stew.) 606, this court held that whenever the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portion so devoted to the common advantage otherwise than in the manner indicated; that the grantees are regarded as purchasers, by implied covenant, of the right to use the streets as a means of passage to and from their premises, as appurtenant to the premises granted; that this private right is wholly distinct from, and independent of, the right of passage to be acquired by the public, and declared that "the object of the principle is not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated." We further held that the threatened violation, by the grantor or his assigns, of this implied covenant in the deed entitled the grantee to relief in equity by way of injunction.

This decision is controlling both upon the question of the property right of the complainant and of his right to equitable relief. It is true that in the cited case it was shown that the threatened invasion of the complainant's right, if carried out, would greatly depreciate the value of the property purchased by him, and that in the present case the complainant has not made it clear that a like result will follow from the threatened change in the location and width of the streets shown on the original map filed by the Ridgefield Land Company. But this fact does not disentitle him to equitable relief. The threatened injury is, in its nature, a continuing one. If the defendants are permitted to retake into their exclusive possession any part of these streets, and then to sell such portions to purchasers by a reference to the second map, not only will the complainant necessarily become involved in numerous lawsuits with such purchasers, if he attempts to enforce his rights in such land, but the outcome of such litigation it is difficult to foresee. Moreover, the remedy at law is plainly inadequate. If the defendants and their grantees should persist in

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retaining to their exclusive use the land withdrawn from public streets, notwithstanding the recovery of damages against them in actions at law, the complainant would be finally driven to a court of equity in order to be restored to his legal right. It is not equitable that he should be compelled to embark in a series of expensive litigations before being granted relief by injunction for the protection of his rights.

The decree appealed from should be reversed.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, VREDENBURGH, VROOM, GREEN, GRAY, DILL—12.

THE STATE, EX REL. THE BOARD OF HEALTH OF THE STATE
OF NEW JERSEY, appellant,

v.

THE BOROUGH OF VINELAND, respondent.

[Argued April 8th, 1907. Decided June 17th, 1907.]

The seventh section of the act of 1899 (*P. L. p. 536*), entitled "An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission," as amended by *P. L. 1900 p. 113*, makes it unlawful for a municipality to build or operate any plant for the treatment of sewerage from which the effluent is to flow into any of the waters of the state, except under such conditions and upon such plans as shall be approved by the commission.—*Held*, that this legislation, by necessary implication, removes such disposal plants, when constructed on plans and under conditions approved by the commission, from the supervision of the state board of health, which was conferred upon that body by the act to secure the purity of the public supplies of potable waters (*P. L. 1899 p. 73*), and relieves the owners and users of such plants from the liabilities created by that act.

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On appeal from a decree advised by Vice-Chancellor Leaming, whose opinion is reported *ante p. 289*.

Mr. Edward D. Duffield and *Mr. Robert H. McCarter*, attorney-general, for the appellant.

Mr. Herbert C. Bartlett and *Mr. Royal P. Tuller*, for the respondent.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

This is an appeal from a decree of the court of chancery dismissing a bill of complaint filed in the name of the state on the relation of the state board of health, for the purpose of securing an injunction to restrain the borough of Vineland from permitting the effluent from its sewage filtration beds to flow into the waters of a tributary of Maurice river, from which the city of Millville takes its water-supply. The bill is filed by the state board of health under the act of March 17th, 1899, entitled "An act to secure the purity of the public supplies of potable waters in this state." It was dismissed on the ground that, as the learned vice-chancellor considered, this statute was repealed, by implication, by a subsequent act passed in the same year, entitled "An act to prevent the pollution of the waters of this state, by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards, and prescribing, defining and regulating the powers and duties of such commission and such boards," as revised and amended by the legislature of 1900. *P. L. 1900 p. 113*.

We have had occasion at the present term to consider the question whether the act creating the state sewerage commission, by necessary implication, repealed the act to secure the purity of the public supplies of potable waters in this state, and reached the conclusion that it repealed only so much of the prior legislation as was repugnant to the provisions of the later act. *State, ex rel. Board of Health of New Jersey, v. Ihnken*.

It appears from the proofs in the case that the borough of

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Vineland constructed the plant for the treatment of its sewage, the effluent of which flows into the tributary of Maurice river, in the year 1903, under conditions which were approved by the state sewerage commission, and upon plans which it submitted to that body, before constructing its plant, and which received its approval. By the seventh section of the act creating the state sewerage commission, as amended in 1900, it is declared that

"It shall be unlawful for any person, corporation or municipality to build, or cause to be built, or operate any plant for the treatment of sewage or other polluting substance from which the effluent is to flow into any of the waters of this state, except under such conditions as shall be approved by the state sewerage commission, to whom any new plans shall be submitted before building."

The enactment of this provision is a legislative recognition of the fact that the health of the citizens of a municipality absolutely requires the adoption of some method for the disposition of its sewage, and that some part of the effluent thereof will almost inevitably be carried to running streams. Recognizing these facts, and the importance of having such disposal plants constructed under proper supervision, it created a body for that purpose, and declared that it should be unlawful for a municipality to construct any such disposal plant which did not meet with its approval, and, by necessary inference, made lawful all such plants as were constructed upon plans and under conditions approved by the commission. By necessary implication, also, it removed from the supervision of the state board of health sewage-disposal plants so constructed, and relieved the owners and users of such plants from the liabilities created by the provisions of "An act to secure the purity of the public supplies of potable waters in this state."

For this reason the decree appealed from should be affirmed.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDBENBURGH, VROOM, GRAY, DILL—13.

For reversal—None.

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THE STATE, EX REL. THE BOARD OF HEALTH OF THE STATE
OF NEW JERSEY, respondent,

v.

GEORGE IHNKEN, appellant.

[Submitted April 8th, 1907. Decided June 17th, 1907.]

1. So much of the act entitled "An act to secure the purity of the public supplies of potable waters in this state" (*P. L. 1899 p. 73*), as is repugnant to the provisions of the act entitled "An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission" (*P. L. 1899 p. 536*), is repealed by the latter act.

2. The power conferred upon the state board of health by the former of these statutes to invoke the aid of the court of chancery to restrain the discharge of waste water, from the washing of bottles and cans in a creamery and from the cleansing of its floors, into the tributary of a stream from which a municipality obtains its water-supply, is not revoked by the latter statute.

On appeal from a decree advised by Vice-Chancellor Stevenson.

Mr. William C. Cudlipp, for the appellant.

Mr. Edward D. Duffield and *Mr. Robert H. McCarter*, attorney-general, for the respondent.

The opinion of the court was delivered by

GUMMERE, CHIEF-JUSTICE.

The bill in this case was filed in the name of the state, on the relation of the state board of health, for an injunction to restrain the appellant, who was the defendant below, from permitting the waste water from the washing of cans and bottles, and the cleansing of the floors in his creamery near Stockholm in this state, to flow into and pollute a tributary of the Pequannock

river from which the city of Newark obtains its supply of water for domestic use. The bill was filed pursuant to authority conferred upon the state board by the provisions of "An act to secure the purity of the public supplies of potable waters in this state," approved March 17th, 1899. *P. L. 1899 p. 73*. The first section of that act provides that

"no sewage, drainage, domestic or factory refuse, excremental or other polluting matters of any kind whatsoever, which, either by itself or in connection with other matter, will corrupt or impair, or tend to corrupt and impair, the quality of the water of any river, brook, stream, or any tributary or branch thereof, or of any lake, pond, well, spring, or other reservoir, from which is taken, or may be taken, any public supply of water for domestic use in any city, town, borough, township or other municipality of this state, or which will render, or tend to render, such water injurious to health, shall be placed in or discharged into the waters, or placed or deposited upon the ice, of any such river, brook, stream, or any tributary or branch thereof, or of any lake, pond, well, spring, or other reservoir, above the point from which any city, town, borough, township, or other municipality, shall or may obtain its supply of water for domestic use; nor shall any such sewage, drainage, domestic or factory refuse, excremental or other polluting matter, be placed, or suffered to remain, upon the banks of any such river, brook, stream, or of any tributary or branch thereof, or of any lake, pond, well, spring, or other reservoir, above the point from which any city, town, borough, township, or other municipality, shall or may obtain its supply of water for domestic use as aforesaid."

No person or corporation is exempted from the provision of this statute except municipalities, which, at the date of the passage of the act, had a public sewer system legally constructed under municipal authority, discharging its drainage or sewage into any such river, brook, stream, &c.

Upon the hearing in the court of chancery it was considered that the proofs made it clear that the defendant was engaged in polluting the waters of a tributary of the Pequannock river, about ten miles above the Newark intake, and that he was doing so within the prohibition of the act of the legislature just mentioned, as construed by the court of chancery, and subsequently by this court, in the case of *State Board of Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. (18 Dick.) 111; *S. C. on appeal*, 64 N. J. Eq. (19 Dick.) 793.

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We concur with the learned vice-chancellor in his conclusion upon the facts, and in the view expressed by him that the acts of the defendant which are complained of are within the prohibition of the statute referred to.

It is argued before us, however, that the act of March 17th, 1899, was repealed, by implication, by a subsequent statute passed in the same year, and entitled

"An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards, and prescribing, defining and regulating the powers and duties of such commission and such boards" (*P. L. 1899 p. 536*),

and that for this reason the decree appealed from should be reversed, notwithstanding the fact that it is supported by the decision in the *Diamond Mills Paper Company Case*.

In considering this question it is to be borne in mind that an inferential repeal of a statute is a pure question of intention, and that every reasonable intendment will be made against such result; that such destroying effect will be deemed to reside in the more recent statute only when it is absolutely irreconcilable with the prior one. *Ruckman v. Ransom*, 35 N. J. Law (6 Vr.) 565; *Hotel Registry Corporation v. Stafford*, 70 N. J. Law (41 Vr.) 528. And this is peculiarly true with reference to statutes enacted at the same session of the legislature. If it is possible to do so they should receive a construction which will give effect to each. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction, so as to give validity and effect to every other act passed at the same session. The presumption is that different acts passed at the same session of the legislature are imbued by the same spirit, and actuated by the same policy, and that one was not intended to repeal or destroy the other. 1 *Lew. South. Stat. Con.* § 268.

The state sewerage commission statute of 1899 was revised and amended by the legislature of 1900. *P. L. 1900 p. 113*. The amendments, however, made little change in the original statute,

except by increasing the powers of the commission. The question, therefore, to be determined is whether the provisions of the later act of 1899, as amended in the year 1900, are so manifestly inconsistent with, and repugnant to, the provisions of the earlier act, as to disclose a clear intent on the part of the legislature to repeal it. The State Sewerage Commission act, after prescribing for the composition of the commission and the term of office of its members, imposes upon them the duty of investigating the various methods of sewage disposal, in order that it may be able to make proper recommendations in regard thereto; the investigating of all complaints of the pollution of the waters of the state which shall be brought to its notice, and if they shall find that any of the waters of the state are being polluted to the injury of any of its inhabitants, either in their health, comfort or property, to notify in writing any person, corporation or municipality found to be polluting such waters. It then provides that, prior to a time to be fixed by such commission, which time shall not be more than five years from the date of its notice, said person, corporation or municipality must cease to pollute said waters, and make such disposition of their sewage or other polluting matter as shall be approved by the state sewerage commission. It then confers upon any person, corporation or municipality, aggrieved by the finding of the commission, an appeal to the court of chancery, which court is empowered by the act to confirm the finding of the commission, or to reverse or modify it in whole or in part. The act then provides that it shall be unlawful for any person, corporation or municipality to build any sewer, drain or sewerage system from which it is designed that any sewage or other harmful and deleterious matter, solid or liquid, shall flow into any of the waters of this state, so as to pollute or render impure such waters, except under such conditions as shall be approved by the state sewerage commission, but declares that this provision shall not be deemed to prohibit the use or extension of existing sewers, drains or sewerage systems, unless the person, corporation or municipality controlling the same shall be served with a notice to cease pollution, as thereinbefore provided. It then provides

that it shall be unlawful for any person, corporation or municipality to build or cause to be built or operate any plant for the treatment of sewage, or other polluting substance, from which the effluent is to flow into any of the waters of this state, except under such conditions as shall be approved by the state sewerage commission, to whom plans shall be submitted before building; and further, that it shall be unlawful for any person, corporation or municipality, after the date specified in the notice before mentioned, to permit or allow any sewage or other polluting matter to flow into said waters from any sewer, drain or sewerage system, except under such conditions as shall be approved by the state sewerage commission. Authority is then conferred upon the commission to apply to the court of chancery for an injunction to prevent violations of the provisions of the act.

It seems quite clear, from a reading of the provisions of this act, that the powers conferred upon the state sewerage commission are much less extensive than those conferred upon the state board of health by the earlier statute. The sewerage commission is only to take proceedings where actual pollution of the waters of the state is shown to exist, whereas the state board of health is authorized to invoke the aid of the court of chancery whenever the polluting matter, either by itself or *in connection with other matter*, corrupts or impairs, or *tends to corrupt or impair*, the stream from which any municipality obtains its water-supply. The state sewerage commission, before applying to the court of chancery for its injunction, must first notify the offending party to stop the pollution of the water, and must fix the time within which the pollution shall cease, whereas the state board of health may sue out an injunction to restrain the forbidden acts immediately upon ascertaining their existence. The state board of health may restrain the deposit of all kinds of polluting matter upon the ice of any stream, or upon the banks thereof, while the supervision of the state sewerage commission would seem to be limited to such pollution as comes from sewers, drains, sewerage systems or sewage-disposal works.

It is, of course, apparent, from an examination of the two statutes, that the powers conferred upon the state board of health

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by the earlier act have been considerably modified and restricted by the later act. But this fact affords no ground for imputing to the legislature an intent to repeal the earlier act *in toto*. Bearing in mind the settled rule of construction in determining whether a statute has been repealed by implication, all that can be said in the present case is that such of the provisions of "An act to secure the purity of public supplies of potable waters in this state" as are repugnant to the provisions of the later statute are repealed, and that the remaining portions thereof are unaffected by the later act.

The conduct of the appellant which is made the ground of its action by the state board of health, namely, the permitting of waste water from the washing of cans and bottles in his creamery, and from the cleansing of its floors, to flow into a tributary of the Pequannock river, a stream from which the city of Newark obtains its water-supply, is an act not placed within the cognizance of the state sewerage commission by the statute which created that body. The power to invoke the aid of the court of chancery to restrain such action, therefore, still remains with the state board of health.

The decree appealed from should be affirmed.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

2 *Buch.* Bear Lithia Springs Co. v. Great Bear Spring Co.

BEAR LITHIA SPRINGS COMPANY, appellant,

v.

GREAT BEAR SPRING COMPANY, respondent.

[Argued March 18th, 1907. Decided September 27th, 1907.]

The bill of complaint exhibited by the Bear Lithia Springs Company against the Great Bear Spring Company to enjoin the latter from using the word "Bear" or the picture of the animal of that name in connection with its sale of natural water is dismissed, for the reason that the defendant is not shown to have practiced any simulation of the complainant's title or trade mark, whereas the complainant itself has, by its own acts, created in great part the very confusion of which it complains.

On appeal from a decree of the court of chancery advised by Vice-Chancellor Bergen, whose conclusions are reported in 71 *N. J. Eq.* (1 *Buch.*) 595.

Mr. Gilbert Collins, for the appellant.

Messrs. Weller & Lichtenstein, for the respondent.

The opinion of the court was delivered by

GARRISON, J.

The bill of complaint was filed in this cause by the Bear Lithia Springs Company, whose business is selling "Bear Lithia Water," to enjoin the Great Bear Spring Company, whose business is selling "Great Bear Spring Water," from applying the word "Bear" to the water so sold by it, and also from making any use of the said word or of the figure of a bear in connection with its said business, upon the ground that such practices by the defendant result in unfair competition from which the complainant has the right to be protected by injunction.

The learned vice-chancellor who heard the cause advised that the complainant's bill be dismissed without regard to its merits,

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because the statement "bottled at the springs" on the complainant's letterheads and on some of its labels was not in all respects true, and also because certain of its advertised statements touching the therapeutic efficacy of the water itself were not borne out by the testimony.

We are not convinced of the propriety of the application that was thus made by the vice-chancellor of the ethical maxim of "clean hands" to the circumstances of the present case, but refrain from an extended discussion of the considerations that seem to us to be involved, for the reason that from our examination of the case we have reached the conclusion that the complainant is not entitled to relief upon the merits of the controversy, and hence that the decree of the court of chancery dismissing the bill of complaint should be affirmed.

The salient facts relied upon by the complainant in support of its claim of unfair competition by the defendant are that the parties are both engaged in the business of selling natural water; that the name of the water sold by each contains the word "Bear;" that the labels and literature used by each display a picture of the animal of that name, and that the titles of the two corporations are sufficiently alike to lead to confusion in the public mind.

The equitable question is whether the defendant is unfairly profiting by these points of similarity.

The underlying facts necessary to the determination of this question are in part objective and in part historical.

Objectively the representations of a bear used by complainant and defendant respectively are as dissimilar as it is possible for them to be. The complainant's bear is black—in fact, is the common black American bear—and is depicted as standing upon all fours on *terra firma*, with the words "Bear Lithia Water" conspicuously displayed, in pure white letters, across its entire side. The defendant's bear, on the other hand, instead of being black, is white—is, in fact, the large white polar bear. Instead of being on all fours, it stands erect on its hind feet; instead of being on dry land it is in water in which ice is floating, or is crawling up on a floating cake of ice. Instead of presenting a side view it presents a front view, and instead of the lettering

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used by the complainant it has no lettering at all. In fine, if the effort of the defendant had been to depict a bear that could by no possibility be mistaken for the complainant's, that result could not have been more successfully accomplished. So obvious is this fact that complainant is forced to make the claim that any use of any picture of any bear by the defendant in connection with the sale of water is an unwarranted intrusion upon a field already preempted by the complainant. If this broad claim of the right to preempt an entire genus of animals by the earlier use of a single species could ever be supported, it still would not have the controlling effect claimed for it in the present case, for the reason that the name of the complainant's water was not taken at all from the animal whose entire genus it thus seeks to preempt, but from a mineral spring in Virginia that bore the name of its owner, which chanced to be Bear. The testimony shows that as long ago as 1778 the spring from which the complainant's water comes, at or near Elkton, Virginia, was owned by a family named Bear, and that as recently as 1885 this spring was on the dividing line between the farms of Henry A. and Adam C. Bear, one of whose relatives was instrumental in having the first analysis of the water made. The analysis thus made showing a trace of lithia, that word was added to the family name of Bear in speaking of the water and in its sale for those therapeutic purposes for which both lithia and the copious use of water were supposed to be efficacious. So that "Bear Lithia Water," at that date and now, indicates merely that the water came from the spring owned by the Bear family, and that its curative properties are attributable, in part at least, to the presence of lithia. In view of this history the adoption of the picture of the animal of the same name as the owners of the spring, while a perfectly legitimate and somewhat felicitous play upon words, lays no foundation for the broad claim of a pre-emption of the whole genus *ursus*.

Incidental reference has been made to the circumstance that the word "Lithia" came into the name of the complainant's water contemporaneously with its exploitation as a medicinal agent. So firmly was this fact established before the learned vice-chancellor that it led him to deny any relief at all to the

complainant, because of the extravagant terms in which the therapeutic value of its lithia water was pressed upon the public. The significance of this fact upon the merits of the case is that the defendant is now, and always has been, a dealer in potable table water for which no medicinal properties are claimed, so that so long as the public was being taught by the complainant to regard its lithia water as a medicament no practical confusion arose, as it would not naturally occur to anyone that a medicinal agent of the advertised potency of the complainant's could safely be used as a mere table water. Whatever confusion has arisen dates from the time when the complainant, in the exploitation of its water, began to advertise its general potable qualities and to introduce it as a mere table water. Hence the confusion of which the lithia company now complains was in reality caused by its own acts, and it must be fundamental in cases of unfair competition arising from confusion of goods that equity will not aid the party that has itself occasioned the confusion.

In another significant respect, also, the complainant has directly brought upon itself the confusion of which it complains, viz., in the insertion of the word "Springs" in its corporate title, thereby making it quite similar to the title previously adopted by the defendant.

In April, 1899, the defendant was incorporated in this state under the name of "The Great Bear Spring Company." At this time the complainant was carrying on business under the corporate title of the "Bear Lithia Water Company," a title which, by the absence of the word "Spring," was readily distinguishable from that of the defendant. But in August, 1899, the complainant also became incorporated in this state, and then inserted in its title the word "Springs," thereby bringing upon itself whatever of confusion arises from the similarity of the two corporate titles in that respect.

It thus appears that the defendant has been guilty of no scheme of simulation leading to confusion, but, on the contrary, has exhibited a studied effort to avoid such a result; but that the complainant, on the contrary, has, either wittingly or unwittingly, so shifted its business and changed its title as to be in fact responsible for the very confusion which it now sets up as the basis for equitable relief.

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The fact has not been overlooked that on one occasion the defendant's water was advertised in connection with the picture of a black bear similar to the complainant's, but this picture was at once withdrawn, and the testimony satisfies us that its use was inadvertent and practically non-injurious to the complainant.

The complainant also contends that the defendant's use of the word "Bear" in "Great Bear Springs Water" is in effect a fraud perpetrated to injure complainant's business.

This contention derives its main support from the circumstance that the first concern that handled the Great Bear Springs water was a partnership that, under the firm name of "The Pure Water Supply Company," sold Great Bear Springs water under some sort of a license from the Fulton Water Supply Company. When the defendant acquired the rights of these two concerns in the sale of the Great Bear Springs water it took its corporate title from the already established name of the commodity in which it proposed to deal. So that whether in point of fact the water actually came from the Great Bear Springs is of little moment on the question of fraud. As a fact, the water was unquestionably named after a somewhat celebrated group of springs in Oswego county, New York, which as early as 1860 at least are shown by the testimony to have been called "The Bear Springs" or "The Great Bear Springs." The physical conditions affecting these springs were such that those at quite a distance from a given member of the group would be appreciably affected by conditions affecting the latter. This circumstance accounts for the extension of the name in a somewhat loose way to springs in the vicinage without any very great attempt at geodetic accuracy. The principal spring of the group had unquestionably been absorbed by the water works system at Fulton, which had licensed the predecessor of the defendant to sell water from more distant springs as Great Bear Springs water. Whether there is any direct physical connection between the defendant's spring and the original Great Bear Spring is a fact that is quite difficult to determine from the testimony and quite unimportant in its bearing upon the issue. The material fact is that, whether accurately or inaccurately from a hydrostatic

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point of view, the defendant's water took its name under natural conditions that completely negative the notion of fraud or of any purpose of unfair competition as regards the complainant.

A review of the entire testimony satisfies us that the complainant has failed to make out a case of unfair competition, and as the decree of the court below was that the complainant's bill should be dismissed, we affirm that decree, for the reasons we have briefly indicated.

For affirmance—THE CHIEF-JUSTICE, GARRISON, PITNEY, SWAYZE, REED, TRENCHARD, VREDENBURGH, DILL—8.

For reversal—HENDRICKSON, BOGERT, VROOM, GREEN, GRAY—5.

JOHN C. FARR, JUNIOR, respondent,

v.

LOUIS HAUENSTEIN and THERESA HAUENSTEIN, appellants.

[Argued March 6th, 1907. Decided June 17th, 1907.]

Upon a creditor's bill filed to have a judgment against a husband declared a charge against the wife's house and lands, on the ground that the property had been conveyed to the wife by the husband through a third party, in fraud of his creditors, the court refused to declare the deed fraudulent as against complainant, but it appearing that the husband, since the transfer, had paid the interest on a mortgage upon the premises, and also taxes and assessments thereon during a period of thirteen years to an aggregate amount but little less than the amount of the judgment, made a decree charging the land with the payment of the judgment to the extent of those payments.—*Held*, on appeal, that it appearing from the evidence that at least part of the money so paid by the husband was advanced to him by his son for the purpose of making those payments in relief of his mother's home, and it further appearing that during the whole period the husband, whose duty it was to provide a home for his family, had used and occupied his wife's house and lands for that purpose, and it not being made to appear that the amount of such payments were

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in excess of the amount necessary for the reasonable support of the wife and family, such payments were not fraudulent as against creditors, and that the bill should have been dismissed.—*Held further*, that it appearing that the creditor had delayed the filing of his bill for thirteen years after the recovery of his judgment, and that the situation of the wife had been entirely changed thereby from what it otherwise would have been, to her prejudice, the bill should have been dismissed on the ground of laches also.

On appeal from a decree of the court of chancery advised by Vice-Chancellor Garrison, whose opinion is reported in 70 N. J. Eq. (4 Robb.) 635.

Mr. James F. Minturn, for the appellants.

Mr. Leon Abbett, for the respondent.

The opinion of the court was delivered by

HENDRICKSON, J.

The complainant, Farr, is the assignee of a judgment recovered against Louis Hauenstein, one of the defendants, in 1890. He filed his bill in 1903 charging that a certain dwelling-house and two lots of land in Hoboken, the title to which was in Mrs. Hauenstein, had been conveyed to her by her husband, through a third party, in fraud of his creditors, and asking for a decree so declaring and charging the judgment to be a lien upon the lands. The learned vice-chancellor refused to declare the deed fraudulent as against complainant, but discovering from the evidence that the husband had, since the date of the transfer, paid interest on a mortgage on the premises and the taxes annually assessed against it and certain assessments for improvements, concluded that the value of the property had been increased to the extent of the sum total of those payments, and that the complainant was entitled to follow those moneys of the husband into the hands of the wife and charge the lands with the payment of the judgment to the extent of such payments. The aggregate of these payments was \$2,172.19, which was something less than the amount due on the judgment and interest. The decree made this amount a charge upon the lands

and directed that in default of its payment within ten days by the defendants an execution might issue. The wife appeals from this part of the decree and claims that the decree should be reversed and the bill dismissed for want of equity and on the ground of laches. The opinion of the learned vice-chancellor refusing to set aside the deed as fraudulent appears in 69 *N. J. Eq.* (3 *Robb.*) 740. His later opinion, allowing this decree, appears in 70 *N. J. Eq.* (4 *Robb.*) 633.

It appears that the learned vice-chancellor, in reaching the conclusion he did, followed *Walsh v. Rosso*, 41 *Atl. Rep.* 669; *S. C.*, on final hearing, 59 *N. J. Eq.* (14 *Dick.*) 123. It will be observed, however, that the circumstances of the case *sub judice* are quite different from the one last cited, and involves, we think, the application of a different rule. The burden of proof was upon the complainant, and we think he failed to show that the moneys paid in liquidating the taxes and interest was the husband's money; that, on the contrary, it appears that they were advanced to him by his son for the purpose of making these very payments in relief of his mother's home, and that such part of the moneys so advanced and used cannot be reached by the complainant. We also think that none of the moneys so paid by the husband can be reached by this proceeding. The husband was charged with the support of his family and with the duty of providing for them a home. That home was the house and premises of the wife. She had the right to lease the property and derive an income therefrom had she so desired. She permitted her husband to use it as the family home during all these years. Instead of paying rent *eo nomine*, he paid it in the shape of contributions to settle the accumulations of interest and taxes. Such payments are within the rule that

"if the husband expend money upon lands of his wife in his occupation by erecting buildings or making improvements thereon, the law will presume he intended it for her benefit, and he cannot recover for the same." 1 *Washb. Real Prop.* 346 ¶ 20.

It was held by this court in *Coyne v. Sayre*, 54 *N. J. Eq.* (9 *Dick.*) 702, that the wife's appropriation to the purchase and improvement of her lot of the labor and services of her husband,

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so long as it did not appear that the value thereof was beyond the amount necessary for the reasonable support of his family, was not fraudulent as against creditors. It does not appear that these payments by the husband were beyond the amount necessary for the reasonable support of the family, and it follows that any addition of value they may have contributed to the lands in question belong to the wife. In the case of *Smith v. Kane*, 2 *Paige* (N. Y.) 303, there was an effort by the creditor of a husband to reach a debt due the wife which had not been reduced to possession by the husband. It was held that it could not be reached by a creditor's bill because the wife's equity was superior to that of the creditor. See, also, 15 *Am. & Eng. Encycl. L.* (2d ed.) 837bb; 12 *Cyc.* 29 ¶ 5. We think that on this ground the bill should have been dismissed. And we think the same result should have followed on the ground of laches. If the complainant or his assignor had moved promptly in this matter and attempted to enforce their judgment against this property, no such situation as that which now exists would have been created. They would, under the present proofs, have failed to obtain a decree that the deed was made in fraud of creditors; if they had succeeded in establishing the existence of such a right as the vice-chancellor now declares, the further contributions of the husband to the maintenance of a home for the family would have been made in a very different way. We think the long delay, some thirteen years, between the recovery of the judgment and the filing of this bill, has been such laches as to entirely change the situation from what it otherwise would have been. Prejudice by changes of conditions and changed relations involved by such delay are among the grounds upon which this principle of equitable estoppel is usually applied. *DeGrauw v. Mechan*, 48 N. J. Eq. (3 Dick.) 219; *Tynan v. Warren*, 53 N. J. Eq. (8 Dick.) 313. The result is that the decree must be reversed.

For affirmance—PITNEY, REED, GREEN—3.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, SWAYZE, TRENCHARD, BOGERT, VROOM, GRAY, DILL—10.

Wyckoff v. O'Neil.

72 Eq.

MARTHA WYCKOFF and ELIZABETH WYCKOFF, respondents,

v.

WILLIAM O'NEIL, executor of Mary E. Harris, appellant.

[Argued March 27th, 1907. Decided June 17th, 1907.]

1. Where an executor has paid the collateral inheritance taxes upon legacies given by the will, although it is his duty to deduct such tax at settlement with the legatee, under *Gen. Stat. 3340 ¶ 268*, he may properly make the payments and have allowance for them in his final account.

2. An executor is not ordinarily compelled to pay such tax until the expiration of the year allowed him by law for the settlement of the estate, and he should not be refused allowance for such interest as he would be required to pay if the tax were paid within the year.

3. He will not ordinarily be chargeable with interest on moneys in his hands uninvested for and during the year allowed him in which to settle the estate.

4. An executor is not entitled to commissions until his accounts have been settled and allowed by the court, and if he withdraws from the estate prior to such settlement any money on account of such commissions he will be chargeable with interest thereon to the time of his accounting.

On appeal from a decree of the prerogative court advised by the vice-ordinary, whose opinion is reported in *71 N. J. Eq. (1 Buch.) 729*.

Mr. Gilbert Collins, for the appellant.

Mr. William H. Morrow, for the respondents.

The opinion of the court was delivered by

HENDRICKSON, J.

This is an appeal from a decree of the prerogative court entered upon an appeal from a decree of the orphans court of Warren county wherein the respondents were the exceptants and the appellant the accountant. The conclusions of the vice-ordinary

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will be found in 71 *N. J. Eq.* (1 Buch.) 729. The appellant filed with the surrogate his final account as executor of Mary E. Harris. To this account exceptions were filed.

The first item in controversy was a payment of \$1,027.75, paid to the state treasurer in satisfaction of the total sum assessed against all the legacies subject to a collateral inheritance tax. This sum included the principal of the tax and interest on it and also a penalty for not paying the same within nine months from the death of the testatrix. The section of the statute regulating such payment may be found in *Gen. Stat.* 3340 ¶ 266. We do not think the executor was bound to pay the tax until the expiration of the year allowed him by law, within which to settle the estate. He is entitled to know the amount available for the payment of legacies after the debts are paid and to have a reasonable time thereafter, before he pays the tax on the legacies. We think, therefore, that the accountant should be allowed for the principal of the tax he has paid with interest collected thereon under the statute for one year at the rate of six per cent. And being bound to pay the tax on the legacies at the expiration of the year he cannot be allowed any interest he has paid thereon after that period and is chargeable with the whole penalty, and is not entitled to be allowed in the accounting for the excess interest or the penalty. In other words, anything on account of this item in excess of the principal amount and interest thereon at six per cent. for one year should be disallowed. The vice-ordinary held further that the accountant was not entitled to any allowance for those payments, for the reason that the amount of the tax on each legacy should be deducted from the legacy itself in settlement with the legatee, and, therefore, did not enter into the executor's account as executor. We are unable to agree with the learned vice-ordinary upon this point. We think the executor should show in his account every payment made by him as executor. The distribution of those payments among the various legatees is a matter of subsequent arrangement between him and them when he comes to pay the legacies. In stating his account it would be better, doubtless, that the accountant should distribute the sum total of the inheritance taxes, showing just how much thereof was chargeable against each

legacy, but the failure to so distribute is no reason for disallowing the payment of the item in the account.

The next exception relates to a credit in the account of \$300 for counsel fees paid Joseph H. Wilson for attorney's services. The vice-ordinary disallowed this payment for the reason that the allowance of \$100 counsel fee on the final accounting, which also appeared in the account and was excepted to, was ample compensation for any services counsel could have properly rendered the executor in the discharge of his duties. In this we agree with the vice-ordinary.

The next exception is to a charge of interest decreed by the orphans court against the accountant on \$700, withdrawn by the executor as his commission. He drew this amount three months after the testatrix's death and almost a year before his final account was filed. Upon his final accounting the commissions were fixed at \$717.52, so that, with the exception of the \$17.52, he had in his possession, subject to his own use, his commissions for services for nearly a year before they were finally rendered. As he was not entitled to commissions until his accounts had been settled and allowed by the court, he was properly charged with interest on the amount which he had withdrawn from the estate.

As to the items aggregating \$25.50, for traveling expenses to Philadelphia in dealing with certain mortgage securities of the estate, which were disallowed by the vice-ordinary on the ground that the accountant had other business which took him to that city weekly when he could very readily have transacted the business referred to, we think the ruling was too strict as to this item. The accountant was under no obligation to attend to the business of the estate on the occasions when he was there on account of his own business concerns, and he states that on the occasions for which he has charged expenses he visited the city solely to transact the business of the estate. This item should have been allowed.

We think the vice-ordinary was right in refusing to charge the accountant with interest on moneys in his hands previous to the accounting. It was the executor's business to reduce the estate to cash and he was under no obligation to make temporary

2 Buch.Squire v. Princeton Lighting Co.

investments of it. The decree of the prerogative court will be reversed and modified along the lines here suggested.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

WILLIAM A. SQUIRE

v.

PRINCETON LIGHTING COMPANY.

[Argued March 22d, 1907. Decided November 18th, 1907.]

1. Under the General Corporation act (*P. L. 1896 p. 298 §§ 65, 68*), the title of an insolvent corporation to its property continues until there is either an adjudication of insolvency or the appointment of a receiver or trustee.

2. Upon the filing of a bill of complaint against an insolvent corporation, under section 65 of the General Corporation act (*P. L. 1896 p. 298*), the court of chancery made an order restraining the corporation from paying or transferring its moneys and effects, or contracting any debts, and from selling, assigning or transferring its property, and also requiring it to show cause on a later day why an injunction should not issue and a receiver be appointed. Thereafter, and before the hearing of the order to show cause, a common-law judgment was recovered against the corporation, upon which execution was issued to the sheriff, who made a levy upon personal property of the corporation sufficient to satisfy the judgment. Upon the hearing of the order to show cause, a receiver was appointed, who took possession of the personal property upon which levy had been made and used it for the benefit of the estate of the corporation.—*Held*, that the judgment creditor was entitled to priority in payment.

On appeal from an order of the chancellor advised by Vice-Chancellor Bergen, whose opinion is reported in *64 Atl. Rep.* 474.

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Mr. George Whitefield Betts, Jr., for the appellant.

Mr. Frank S. Katzenbach, Jr., for the respondent.

The opinion of the court was delivered by

PITNEY, J.

The Westinghouse Electric and Manufacturing Company recovered a common-law judgment in the Mercer county circuit court against the Princeton Lighting Company on April 12th, 1904, upon which execution was issued to the sheriff. The sheriff, on April 13th, made a levy upon personal property of the defendant sufficient to satisfy the judgment. On April 11th the complainant, Squire, exhibited in the court of chancery a bill of complaint against the lighting company under section 65 of the General Corporation act (*P. L. 1896 p. 298*), praying for an injunction and the appointment of a receiver on the ground of insolvency, and on the same date that court made an order restraining the lighting company from paying or transferring its moneys and effects or contracting any debts and from selling, assigning or transferring its property, and also requiring it to show cause, on April 19th, why an injunction should not issue and a receiver be appointed. On April 19th a receiver was appointed and injunction issued pursuant to the prayer of the bill and in accordance with the statute. The receiver took possession of the personal property upon which the levy had been made, and used it for the benefit of the estate of the corporation.

Subsequently the Westinghouse company presented a claim to the receiver for the amount due upon its judgment, claiming a preference under section 86 of the Corporation act (*P. L. 1896 p. 304*), on the ground that by its judgment and execution it had obtained a lien upon the property of the insolvent company. The receiver refused the preference, and from this action the Westinghouse company appealed to the chancellor. The appeal was heard by Vice-Chancellor Bergen, who dismissed the same on the ground that the appellant was not entitled to a preference. The present appeal brings that adjudication under review.

The question thus raised for our decision is whether the title of the receiver upon his appointment, on April 19th, related back to April 11th, the date of the making of the order to show cause. The learned vice-chancellor held that it did, upon the ground that the court of chancery, on April 11th, held, in effect, that the corporation was insolvent and restrained it from transferring its property, it being his view that under such circumstances it is inequitable to permit creditors to accomplish by indirection that which the corporation is directly restrained from doing, to wit, transferring its property in order to pay its debts. The decision is based upon the supposed equity of the Corporation act, and, as we think, is unsupportable either by its letter or by its spirit.

Section 65 of that act provides that upon the filing of a bill or petition by any creditor or stockholder setting forth the facts and circumstances to show that the corporation has become insolvent, or has suspended its ordinary business for want of funds to carry on the same, the court, on being satisfied by affidavit or otherwise of the sufficiency of the application and of the truth of the allegations, *and upon such notice, if any, as the court by order may direct*, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if, upon such inquiry, it shall appear to the court that the corporation has become insolvent, and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its assets, moneys, &c., except to a receiver appointed by the court.

Section 66 provides that at the time of ordering the injunction, or at any time afterwards, the court may appoint a receiver with full power and authority to take possession of the property of the corporation, and other powers not necessary to be here particularly recited.

Section 68 enacts that

"All the real and personal property of an insolvent corporation, where-soever situated, and all its franchises, rights, privileges and effects, shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

The practice prescribed by section 65 is elastic. It permits the court to summarily determine the question of insolvency upon presentation of the bill and affidavits and without notice to the corporation, and forthwith to take charge of its effects by the appointment of a receiver, if the court deems it proper to pursue that course. But it also permits postponing consideration of the question of insolvency until a later time, and its determination after notice to the corporation concerned.

It seems to us that the learned vice-chancellor erred in treating the present case, as if the court below, upon the filing of the insolvency bill, had proceeded without notice to inquire into the question of insolvency and had thereupon adjudged the corporation insolvent.

The case shows that this was not done; that on April 11th there was no hearing upon the question of insolvency, no adjudication of insolvency, and no general restraint paralyzing all the functions of the corporation. The restraint was limited; it prohibited voluntary acts of the defendant with respect to paying or transferring its moneys and effects, contracting debts, and selling, assigning or transferring its property, but did not in words or by necessary effect restrain third parties from pursuing their lawful remedies *in invitum* the company.

We do not rest our view alone upon the provision of section 68 that the property of the insolvent corporation vests in the receiver upon his appointment. We do not at present dispute that the court of chancery, upon adjudicating that a corporation is insolvent, may forthwith divest it of its corporate functions and place its assets in the course of administration indicated by the statute. A receiver or trustee is the officer intended by the statute and ordinarily appointed by the court to carry out this main object. But it is the adjudication of insolvency that furnishes the occasion for placing the assets of the corporation into the custody of the law.

Section 65 provides that the court, upon determining that the corporation has become insolvent, may issue an injunction restraining it from exercising any of its privileges or franchises, as well as from transferring its estate, &c., and section 66 provides that the court, "at the time of ordering said injunction, *or at any time afterwards*, may appoint a receiver or receivers, or trustees," &c. The act plainly contemplates that the appointment of a receiver may be postponed to a time subsequent to the adjudication of insolvency, with its accompanying enforced paralysis of all the corporate functions. But in the order of April 11th, 1904, there was neither appointment of a receiver nor adjudication of insolvency.

The learned vice-chancellor entertained the view that in order to grant the restraint that was included in the order of April 11th the court must have found that the corporation was insolvent within the meaning of the act. We think the clear intent of the statute is to the contrary, and that such an order to show cause as was here made (which in this aspect merely provided that an application for an adjudication of insolvency might be made upon notice to the corporation) does not determine the question of insolvency, but, on the contrary, determines that the corporation shall be heard before that question is decided.

The question now presented seems not to have been previously passed upon by this court, but the current of authority in the court of chancery seems to agree with the view we have expressed.

In *Minchin v. Second National Bank*, 36 N. J. Eq. (9 Stew.) 436, a receiver had been appointed in this state for an insolvent corporation of New York under our Corporation act of April 7th, 1875, which, in section 103 (*Rev. 1877 p. 196*), subjected foreign corporations doing business in this state to all the provisions of the act so far as applicable. Chancellor Runyon, who decided the case, recognized (36 N. J. Eq. (9 Stew.) 440) that some of those provisions could not be applied to foreign corporations—for instance, that our court of chancery could not hinder such corporations from exercising their franchises, excepting as it might restrain them from exercising them in this state. He recognized that the question presented was as to the

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character and extent of the power over the corporate property for the purpose of administering it for the benefit of creditors or stockholders. He expressed (at p. 442) the view that "the mere filing of a bill in such case does not divest the company of its property. The appointment of a receiver under the statute operates as a transfer." And he sustained the right of creditors, notwithstanding bill filed, to proceed at law to secure a lien upon the property and to retain that lien as against a receiver subsequently appointed.

In *Graham Button Co. v. Spielmann*, 50 N. J. Eq. (5 Dick.) 120, 124, Vice-Chancellor Van Fleet said, referring to the provisions of sections 72 and 80 of the Corporation act of 1875 (corresponding in substance to sections 66 and 86 of the act of 1896): "The effect of these two provisions is, as it seems to me, to fasten the debts of a corporation upon its property *the moment it is adjudged to be insolvent and a receiver is appointed to wind up its affairs*. From that time forth its property is by law appropriated exclusively and irrevocably to the payment of its debts."

Section 68 of the Corporation act of 1896, which provides that upon appointment of a receiver the property of the insolvent corporation forthwith vests in him, is a new section, intended to set at rest the question whether the property of an insolvent company vests at all in the receiver. Upon the law as it formerly stood this question had been in doubt.

In *Willink v. Morris Canal and Banking Co.*, 4 N. J. Eq. (3 Gr. Ch.) 377, 400 (1843), the chancellor held that under the "Act to prevent frauds by incorporated companies" the property of the company did not vest in the receivers; that they were merely substituted in the place of directors and managers for the purpose of settling up and closing the affairs of the company; that the title to the property was not changed, but a power only delegated to the receivers to take charge of it and sell it.

Six years later another chancellor, apparently in ignorance of the previous decision, held that the statute and the appointment of receivers under it was a conveyance or transfer of all the property of the insolvent corporation to the receivers. *Corrigan*

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v. *Trenton Delaware Falls Co.*, 7 N. J. Eq. (3 Halst.) 489, 496 (1849).

In *Freeholders of Middlesex v. State Bank*, 29 N. J. Eq. (2 Stew.) 268, 274 (1878), Vice-Chancellor Van Fleet held that the appointment of a receiver under the Corporation act of 1875 invested him with full power to sell, assign and convey all the property of the corporation. *Rev. 1877 p. 139 § 72.* "No act by the corporation," he said, "is necessary to complete either the title of the receiver or that of his purchaser. Unlike proceedings under Bankrupt laws, no assignment by the debtor or commissioners is required. Title is divested by force of law, and such divestiture is perfect and absolute."

The same view was entertained by Chancellor Runyon in *Minchin v. Second National Bank*, 36 N. J. Eq. (9 Stew.) 436, 442, who cited *Corrigan v. Trenton Delaware Falls Co.*, *supra*, and *Freeholders of Middlesex v. State Bank*, *supra*.

But in *Receiver of State Bank v. First National Bank*, 34 N. J. Eq. (7 Stew.) 450, 456, Vice-Chancellor Van Fleet held that the receiver had a mere right of possession and power to sell; that the law took custody of the property, leaving the title unchanged until sale made.

And in *Kirkpatrick v. Corning*, 37 N. J. Eq. (10 Stew.) 54, 60, Chancellor Runyon himself adopted the view last mentioned, at the same time pointing out that while Vice-Chancellor Van Fleet's judgment in *Freeholders v. State Bank* was affirmed by the court of errors and appeals in 30 N. J. Eq. (3 Stew.) 311, 339, the view expressed by the vice-chancellor upon the present topic was unnecessary to his decision, and there was no opinion in the court of last resort. See, also, cases cited in *Crews v. United States Car Co.*, 57 N. J. Eq. (12 Dick.) 357, 362.

Section 68 of the act of 1896 settles this long-disputed question as to whether the receiver took title or only custody of the property of the insolvent corporation.

The present question is, When does the title of the insolvent corporation cease? We answer, Not before there is either an adjudication of insolvency or the appointment of receiver or trustee.

In *Gallagher v. Asphalt Company*, 65 N. J. Eq. (20 Dick.)

258, 270, Vice-Chancellor Stevenson said: "I think it is sufficient to say that in New Jersey, apart from the direct effect of statutes, an insolvent corporation has the same dominion over its assets, and its creditors have the same power to reach those assets for the payment of their claims, that we find exhibited in the case of an insolvent natural person. The modifications and limitations of this dominion of the corporation over its property, and this power of the creditors to reach that property preferentially, are derived from our statutes, and not from any theory that immediately upon the insolvency of a corporation anything that can properly be described as a trust is created in respect of the corporate assets. Of course, when, by reason of the insolvency or of the dissolution of a corporation, or from any other cause, the assets of the corporation are placed in the possession of a receiver, or have become vested in him by law, a trust of a high character is at once created. But neither the insolvency or other condition of the company, nor the commencement of a suit to establish a receivership and the trust connected therewith, has the effect to establish such trust."

The only New Jersey case cited to the contrary is *Doane v. Millville Mutual Insurance Co.*, 43 N. J. Eq. (16 Stew.) 522, 535. Upon the filing of a bill setting up inability of the company to pay its debts, an order was made requiring it to show cause why a receiver should not be appointed, "together with an order restraining the defendant from performing any duties whatsoever devolving upon it." Vice-Chancellor Bird held that a judgment entered upon the same day that this restraining order was made did not entitle the creditor to a preference. He said: "When the court steps in and takes possession, all opportunity for anyone to obtain an advantage by his diligence ceases." This decision was reversed by this court upon grounds that do not either affirm or overthrow this view. *Doane v. Millville Mutual Insurance Co.*, 45 N. J. Eq. (18 Stew.) 274, 282. With respect to Vice-Chancellor Bird's decision upon the point now raised, it is sufficient to say that if the order that he had under consideration did amount to a taking possession of the assets of the company by the court, his declaration that there was no longer opportunity for anyone to obtain advantage by

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diligence is correct. The restraining order that we have under consideration had no such effect.

It follows that the levy made by the sheriff upon the personal property of the Princeton Lighting Company under the execution of the Westinghouse company established a valid lien upon that property, and the subsequent conversion of the property by the receiver entitled the Westinghouse company to priority in payment.

The order under review herein should be reversed, and the cause remitted for further proceedings, in accordance with the views above expressed.

For affirmance—REED—1.

For reversal—THE CHIEF-JUSTICE, GARRISON, HENDRICKSON, PITNEY, SWAYZE, TRENCHARD, BOGERT, VREDENBURGH, GREEN, GRAY, DILL—11.

BURLINGTON CITY LOAN AND TRUST COMPANY et al., appellants,

v.

PRINCETON LIGHTING COMPANY et al., respondents.

[Argued March 22d, 1907. Decided November 18th, 1907.]

1. Where corporations are merged into a new corporation, and mortgage bondholders of one of the constituent companies exchange their bonds for mortgage bonds of the consolidated company by depositing them with a trustee, who retains them uncanceled, the question whether they are in equity to be held to be satisfied depends upon the intent of the parties and the facts of the case.

2. Where an agreement for the merger of corporations provides for the issue of mortgage bonds to be exchanged for similar bonds of the constituent companies, the holders of the latter bonds who do not assent to the merger agreement cannot complain if the parties thereto vary the terms upon which the bonds are exchanged.

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3. Where an agreement for the merger of corporations provides for the exchange of the whole of an outstanding issue of bonds for new bonds of the consolidated company by depositing them with a trustee, and the deposited bonds are held by the trustee uncanceled, and the agreement is not consummated owing to the failure of some of the old bondholders to assent, the question whether the bonds actually deposited are to be held as additional security for the benefit of those depositing them and taking new bonds in exchange, or for the benefit of all holders of the new bonds, depends upon the intention of the parties and the facts of the case.

On appeal from a decree advised by Vice-Chancellor Bergen.

Mr. George Whitefield Betts, Jr., for complainants-appellants.

Mr. Edward P. Johnson, for respondents.

The opinion of the court was delivered by

SWAYZE, J.

This is a bill to foreclose a mortgage given to the complainant trust company to secure certain bonds of the Hopewell Electric Light, Heat and Power Company for \$50,000. By two orders in the cause certain persons who claimed to hold \$40,500 of the bonds were joined as co-complainants and other persons holding \$9,500 of the bonds were allowed to intervene as defendants. The controversy in the case is between these two classes of bondholders. The issue to be decided is whether \$38,500 part of the bonds of the individual complainants are still outstanding obligations.

The bonds and mortgage in suit were given by the Hopewell company in 1901. Two years later the Hopewell company was merged with other corporations to form the Princeton Lighting Company. The agreement of merger provided for an issue of bonds of the new company secured by mortgage for the purpose of taking up securities of the old companies. These new bonds I shall, for convenience, call the Princeton bonds. The portion of the agreement of merger that is of importance for the present purpose reads as follows:

2 Buch. Burlington City L. & T. Co. v. Princeton Lighting Co.

"Of the foregoing number of bonds, fifty thousand dollars (\$50,000) at par shall be retained by the trustee, however, for the purpose of redeeming bond for bond as they are presented, an issue of fifty thousand dollars (\$50,000) of bonds of the Hopewell Electric Light, Heat and Power Company, dated August first, nineteen hundred and one, and secured by a mortgage to the Burlington City Loan and Trust Company, a corporation of the State of New Jersey, which last-mentioned bonds shall be delivered up to the trustee and canceled, so that they shall be no longer a lien upon the property of the Hopewell Light, Heat and Power Company, or upon any of the property of the consolidated company."

The material provision of the mortgage securing the Princeton bonds reads as follows:

"(b) Seventy thousand five hundred dollars (\$70,500) of said bonds are to be retained by the trustee, and are to be certified and delivered from time to time as required to take up and replace fifty thousand dollars (\$50,000) at par of outstanding bonds of the Hopewell Electric Light, Heat and Power Company, dated August first, nineteen hundred and one, which bonds are redeemable by the conditions of the mortgage securing them."

The Hopewell bonds were twenty-year bonds, dated August 1st, 1901, and were subject to redemption after August 1st, 1906, a time which had not arrived when the exchange was made of Hopewell bonds for Princeton bonds soon to be mentioned. The Hopewell mortgage contained in the clause giving the mortgagor the option to redeem after August 1st, 1906, this language: "Providing if less than the whole issue is redeemed, the bonds to be paid shall be determined by chance by the trustee under this mortgage."

There is no suggestion that there was ever any such determination by chance. The \$38,500 of Hopewell bonds now in controversy were exchanged in 1903 by the holders for a like amount of Princeton bonds through the medium of the North American Trust Company, the trustee named in the Princeton mortgage; they were held by that company, and never surrendered for cancellation to the Burlington Trust Company, the trustee named in the Hopewell mortgage and one of the present complainants. After the insolvency of the Princeton Lighting Company the bonds were sold and bought by the individual complainants.

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Under these circumstances the learned vice-chancellor held that the \$38,500 of bonds were satisfied, and advised a decree that the property be sold to pay the remaining \$11,500 of Hopewell bonds, with interest.

The \$38,500 bonds are in fact outstanding as legal obligations uncanceled, and the decree rests upon the supposed equity of the holders of the remaining bonds to have the property sold to pay them alone. The bondholders who profit by the decree were not parties to the merger agreement, and can only obtain the advantage which the decree gives in case the other bonds are to be regarded in equity as actually satisfied. Whether they have been so satisfied or not must rest upon inference, for the holders never in terms were parties to the merger agreement. Their assent to it is to be inferred only from their conduct in acting under it, and in drawing such an inference all their acts ought to be considered; all the circumstances were relevant to show to what extent and upon what conditions they must be inferred to have yielded their assent. It is not for the respondents, who chose to refuse their assent, to complain if the actual parties to the merger agreement chose to modify the terms upon which the depositing bondholders might exchange their bonds. In this view the correspondence between the trust company and the Princeton Lighting Company was admissible to show the terms upon which the bonds were actually deposited. We do not, however, find it necessary to rely upon that correspondence, since we reach the same result by a consideration of the language of the mortgages and the merger agreement only.

Where a contract is to be inferred from the conduct of the parties, the question is obviously one of intention. Upon this point the cases cited in the instructive brief of the respondent and other cases are at one. *Mowry v. Farmers' Loan and Trust Co.*, 76 Fed. Rep. 38, 43; *New York Security and Trust Co. v. Louisville, &c., Railroad Co.*, 102 Fed. Rep. 382; *Barry v. M., K. & T. Railway Co.*, 34 Fed. Rep. 829, 833; *Ames v. Railway Company*, 2 Wood 207; *Fidelity Company v. Shenandoah Valley Railroad Co.*, 86 Va. 1; *Ketchum v. Duncan*, 96 U. S. 659; *Union Trust Co. v. Illinois Midland Railway Co.*, 117 U. S. 434.

2 Buch. Burlington City L. & T. Co. v. Princeton Lighting Co.

The merger agreement provides that the new bonds are to be used for the purpose of redeeming bond for bond as they are presented an issue of \$50,000. The transaction is to be an entire transaction, and it is the whole issue of \$50,000 that is to be redeemed, not some fraction of that issue. The words "bond for bond as they are presented" are intended only to authorize the trust company to acquire these bonds one at a time if necessary, but the redemption is not complete until the whole issue is redeemed; until that time the contract remains executory. This construction is borne out by the subsequent provision that the "last-mentioned bonds" (words which can only refer to the issue of \$50,000) are to be delivered up to the trustee (evidently the Burlington Trust Company since the North American Trust Company was to make the delivery) and canceled. The use of the word "canceled" in connection with the delivery to the Burlington company and to characterize a subsequent act, is a plain intimation that prior to that delivery there was no cancellation. The propriety of having the bonds canceled by the Burlington company, the mortgagee, which would be called on to discharge the mortgage, is manifest. To remove all doubt, the agreement proceeds "so that they" (still evidently meaning the issue of \$50,000) "shall be no longer a lien upon the property" of the Hopewell company. The provision that this issue of bonds should no longer be a lien was incapable of performance until the whole issue had been exchanged.

This result is sustained by an examination of the Princeton mortgage. By that mortgage \$70,500 of the new bonds are to be delivered from time to time as required to take up and replace (not to "pay" or "satisfy") \$50,000 of the Hopewell bonds and certain bonds of the other constituent companies. There is no language here which would authorize the trustee to take up and replace anything less than the whole \$50,000. Until the whole were secured, the bonds which the North American company had redeemed bond for bond as presented under the merger agreement, were held, in escrow as it were, to await the consummation of the entire and indivisible contract.

If we felt any doubt as to the correctness of our conclusion

based upon the language of the merger agreement and the Princeton mortgage, that doubt would vanish upon an examination of the Hopewell mortgage. The provisions of that mortgage as to the redemption of the bonds secured thereby are referred to in the Princeton mortgage. Among them is a clause providing for the case where less than the whole issue is redeemed; that clause requires that the bonds to be paid shall be determined by chance. There was in this case no determination by chance, no doubt because the parties concerned did not regard the transaction as the equivalent of payment.

Upon general considerations of equity we should reach the same result. Three views suggest themselves to us as possible—*first*, the deposited bonds may be held for the benefit of all the new Princeton bondholders pending the exchange of the whole issue; *second*, they may be held as collateral security to the new bonds taken in exchange and for the benefit of the depositing bondholders only; or *third*, they may be treated as satisfied for the benefit of those who have refused their assent to the scheme. The last seems to us inequitable for the reason that it allows non-assenting bondholders to profit by a transaction which they have in effect opposed; all that they are equitably entitled to is such a proportion of the mortgage security as their bonds bear to the whole issue. *Barry v. M., K. & T. Railway Co.*, 34 Fed. Rep. 829.

This allows them all they would have but for the merger agreement, and merely denies them an increased security due to the efforts of others. Equity does not allow them to gather the fruit after others have shaken the tree. While it may fairly be argued, as some of the cases suggest, that the depositing bondholders, by the exchange of bonds, evince an intention to give up the lien of their old bonds, it by no means follows that they intend to give up that lien for the benefit of those who refuse to co-operate with them. It is far more reasonable to assume that if they give it up at all it is for the benefit of all the new bondholders, who in return allow them to share in the security of the new bonds. In the present case none of the parties to the merger agreement—the trust company, the Princeton Lighting Com-

2 Buch. Burlington City L. & T. Co. v. Princeton Lighting Co.

pany (which by virtue of the merger stands in the shoes of the Hopewell company also), the Princeton bondholders, or the depositing Hopewell bondholders—assert that the \$38,500 bonds were satisfied. The trust company, by retaining the bonds uncanceled and not surrendering them to the Burlington company, evinced its intent to preserve their lien, and the only persons having a right to determine that question—parties to the merger or Princeton bondholders—raise no objection.

If it were necessary to hold that the contract was varied, they had the right to vary it.

A somewhat similar case is *Steven v. Mid-Hants Railway, L. R. 8 Ch. App. 1064; 42 L. J. Ch. 694*.

Whether the deposited bonds are held for the benefit of the depositors alone or for the benefit of all the Princeton bondholders we are not now in a position to determine. The former holders of the \$38,500 of Hopewell bonds are not parties, nor do we know what bondholders are represented by the individual complainants. Until the proper parties are brought in, the ultimate disposition of the fund to be realized out of the mortgage premises cannot be decided. The decree must be reversed and the record remitted to the court of chancery in order that a decree may there be entered for the amount due on the whole \$50,000 of bonds. It should direct that the proceeds of the foreclosure sale be brought into that court to abide its further order.

The appellants are entitled to costs in this court.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, GREEN, GRAY, DILL—12.

Woolsey v. Woolsey.

72 Eq.

FRANK WOOLSEY and JAMES P. NORTHRUP, individually and as
surviving executors, appellants,

v.

VIRGINIA M. WOOLSEY and ALICE WOOLSEY, respondents.

[Argued March 22d, 1907. Decided November 18th, 1907.]

The orphans court, upon an executor's accounting, may ascertain the condition of the estate as fully as the court of chancery, and in the absence of fraud, or accident unmixed with negligence or fraud on the part of the accountant, or of some matter of pure equity cognizance, the decree upon the accounting is conclusive upon the executor as to the propriety of allowances claimed by him.

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Bergen, whose opinion is reported in 67 *N. J. Eq.* (1 *Robb.*) 574.

Mr. Robert H. McCarter, attorney-general, and *Mr. James Buchanan* and *Mr. Charles L. Carrick*, for the appellants.

Mr. Richard V. Lindabury and *Mr. Randolph Perkins*, for the respondents.

The opinion of the court was delivered by

SWAYZE, J.

This is an appeal from a decree of the chancellor dismissing a bill for an injunction to restrain the enforcement of a decree entered in the Hudson orphans court pursuant to the mandate of this court. Our former opinion is reported in 68 *N. J. Eq.* (2 *Robb.*) 763. The ground on which relief is sought is an alleged family arrangement by which one of the legatees and one having a life estate in a trust fund created by the will are said to have agreed with the executors to vary the order and priority of payment of legacies, and to accept by way of annuities to themselves partial payments of the principal of the legacy

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and trust fund. The vice-chancellor held that the matter was *res adjudicata*, and that he was therefore bound by our former decree.

To sustain this defence it must appear that the identical matter was involved. *Water Commissioners v. Cramer*, 61 N. J. Law (32 Vr.) 270, 273; *Cromwell v. Sac County*, 94 U. S. 351. The issue in the orphans court was presented in the form of exceptions to certain allowances claimed by the executors. All were in the following form: That the sum claimed to have been paid on annuity account was not in fact paid by said executors, and said item is improperly credited to said executors, and allowance thereof should not be made.

The point made is that this exception questions only the fact of payment, and not the propriety of the allowance claimed by the executors. We cannot concur in this view. The very last words of the exceptions challenge the propriety of the allowance, and the executors did not at the hearing before the master assert that they were not apprised of any reason for the exception other than the bare denial of payment. Upon the contrary, in their testimony they sought to justify the allowances claimed, and did not confine themselves to proving the fact of payment. It was manifestly necessary for them to do so since the burden was on them to prove the propriety of the allowances (*Kirby v. Coles*, 15 N. J. Law (3 Gr.) 441), and the claim of payments on account of annuities as credits against the *corpus* of the estate necessarily arrested attention. The objection was distinctly stated in the master's report, and when the present complainants excepted to that report they in so many words affirmed that the amount was justly and properly paid by the executors under the terms of the will, and should have been allowed by the master. The very form of these exceptions by the accountants themselves presented to the orphans court the question of the justice and propriety of the allowances which the accountants were bound to establish.

The issue now presented is the same. The only difference is in the evidence adduced to sustain it on the part of the accountants. In the present litigation they set forth with a little more distinctness and care the alleged family arrangement, in which.

however, only two of the legatees joined, and one of those a mere life tenant.

Since the issues in the litigations are identical, the only remaining question is whether the orphans court had jurisdiction to pass upon the attempted justification by the executors of their payments of annuities out of *corpus*.

By the statute power is conferred on the orphans court to hear and determine all controversies respecting the allowance of the accounts of executors, administrators, guardians or trustees (*P. L. 1898 p. 715 § 2*), and the section providing for exceptions authorizes the court to examine the accountant touching the truth and fairness of the same. The broad language in which the jurisdiction is conferred, and the authority to examine as to the fairness of the account, authorizes the orphans court to deal with the account on equitable principles, and we have held that the orphans court on such accounting may ascertain the condition of the estate as fully as can the court of chancery (*Pyatt v. Pyatt*, 46 N. J. Eq. (1 Dick.) 285, 288), that case decided that the powers of the court are sufficiently broad to justify it in allowing a guardian credit for payments for the support of his ward after the latter's majority. This result was reached upon a consideration of the powers exercised by the English court of chancery and the New York courts under legislation similar to ours. The court of appeals in New York determined the bounds of the jurisdiction of the surrogate upon an administrator's accounting by reference to the jurisdiction of the courts of equity, and Judge Andrews said: "The surrogate's court is a court of limited powers and jurisdiction, but it has jurisdiction to determine questions either legal or equitable arising in the course of proceedings in the execution of powers expressly conferred, and which must be decided therein." *Hyland v. Baxter*, 98 N. Y. 611. It was there held that the determination of the surrogate, on settlement of an administrator's accounts, denying a claim for advance for support and maintenance of a minor entitled to a share in the estate was *res adjudicata*, conclusive in an action subsequently brought by the administrator therefor.

In this state the orphans court and the court of chancery have a concurrent jurisdiction in matters of this nature, and it is

3 Buch.Woolsey v. Woolsey.

only where there are special reasons for going into equity that that course is justified. *Salter v. Williamson, Administrator*, 2 N. J. Eq. (1 Gr. Ch.) 480.

In the present case there is no matter of peculiarly equitable cognizance which requires the action of the court of chancery. There can, of course, be no question that the accountants, upon a proper statement of their account, were entitled to credit for the payments actually made. What we decided—68 N. J. Eq. (2 Robb.) 763 (at p. 767)—was that, by reason of the payments having been made on account of annuities, the accountants were estopped to deny the receipt of income out of which to make the payments, and as they failed to charge themselves with such receipts, they could not be allowed for the payments. It was open for them in the orphans court to show that the payments were made and received on account of *corpus* and ought therefore to be allowed as credits against the *corpus*. There is nothing in the alleged agreement by Mrs. and Miss Woolsey which prevented the orphans court from dealing with the matter as fully as the court of chancery. The items would not, to be sure, be proper credits as against non-assenting legatees, but that question did not arise. In *Birkholm v. Wardell*, 42 N. J. Eq. (15 Stew.) 337, the ordinary held that, even where improper payments had been made, they should be allowed as between the parties, and in the recent case of *Wyckoff v. O'Neill*, 71 N. J. Eq. (1 Buch.) 729, we have held that payments on account of collateral inheritance taxes should be allowed, although they were chargeable to some only of the legatees and in varying amounts. So in this case, if the agreement had been proved, the respondents could not have been heard to object to an allowance to the executors therefor, and upon a distribution the respective amounts paid to each would have been deducted from their several shares.

Our former decree was based on the equitable estoppel arising out of the facts of the case. A court which was competent to determine a question of equitable estoppel, as we have held the orphans court to be in this case, was certainly competent to hear and determine facts which would prevent the estoppel from operating. There is in this case no ground of equity other than

the estoppel itself, and the parties entitled to its benefit may make it available even in a court of law. *Dickerson v. Colgrove*, 100 U. S. 578; *Drexel v. Berney*, 122 U. S. 241; *Van Marter v. Lucas*, 64 N. J. Law (35 Vr.) 182; affirmed, 65 N. J. Law (36 Vr.) 311. Other cases are cited in *Central Railroad v. MacCartney*, 68 N. J. Law (39 Vr.) 165, 175, and in 16 Cyc. 725, notes 1, 2.

There is a further reason why in this case relief should be denied complainants. They themselves sought to account in the orphans court when the court of chancery was open to them, and they have themselves obscured the issue, if it can be said to have been obscured, by claiming allowance for payments on account of annuities without charging themselves with any receipts applicable to the payments, and have caused this second litigation by their failure to prove the alleged agreement in the orphans court. Having thus, by acts of omission and commission, led to the result of which they complain, they ought not to be allowed to set it aside. To permit that would amount to permitting suitors to experiment with the court, and if defeated in one court to resort to another. The principle upon which courts of equity intervene by way of injunction to restrain judgments in courts of law are applicable to a suit to restrain the enforcement of a decree of the orphans court. Those principles are thus stated in *Mechanics' National Bank v. Burnet Manufacturing Co.*, 33 N. J. Eq. (6 Stew.) 486 (at p. 488), and affirmed on the vice-chancellor's opinion (35 N. J. Eq. (8 Stew.) 344): "Courts of equity sometimes give relief against judgments at law, but only where it is shown that the defendant was ignorant of the facts on which his defence rests until after the time for making defence at law had passed, or that he was prevented from making defence by the artifice or fraud of his adversary, or by accident unmixed with negligence or fraud on his part, or that his defence is a matter of pure equity cognizance. But in cases where the grievance he attempts to urge is one that the court which pronounced the judgment is competent to hear and decide, and he has either urged it there unsuccessfully, or has negligently omitted to do so, this court can give no relief."

In *Phillips v. Pullen*, 45 N. J. Eq. (18 Stew.) 330, where a

*3 Buck.**Woolsey v. Woolsey.*

question of fraud was raised, this court said: "In so far as this contention rests upon fraud in the procurement of the written contract, it is no longer an open question. That was one of the issues directly involved in the suit at law. If true, there could have been no recovery. The thing to be proved and the *quantum* of proof do not differ in the two jurisdictions," and it was held to be *res judicata* that the agreement was not the product of fraud. In *Ruckelschaus v. Oehme*, 48 N. J. Eq. (3 Dick.) 436 (on appeal under the name of *Borcherling v. Ruckelschaus*, 49 N. J. Eq. (4 Dick.) 340), the jurisdiction of chancery was sustained only because the court of law overruled the defence of equitable estoppel, and it was held that the defendant had the option either to test the accuracy of that ruling by a writ of error or to accept it as the law of the case and present his defence to the court of chancery as one not cognizable by a court of law. The learned vice-chancellor had said (48 N. J. Eq. (3 Dick.) 445) that it was not for his adversary, on whose motion the defence at law had been excluded, to say that the ruling of the trial court was wrong and should have been tested by a writ of error. This court said that if he had taken a writ of error he would be undoubtedly estopped from litigating the same question anew in another court. Such is exactly the position here. The appellants presented the question to the orphans court by exceptions to the master's report, and, having been defeated, appealed to the prerogative court, and the decree of that court was brought to this court, with a result adverse to the accountants.

We think the vice-chancellor was right in holding that the matter was *res judicata*, and that it is unnecessary to consider whether the alleged agreement has been proved, or, if proved, would have the effect for which the appellants contend.

The decree should be affirmed, with costs.

For affirmance—THE CHIEF-JUSTICE, GARRISON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—13.

For reversal—None.

Brady v. Carteret Realty Co.

72 Eq.

MICHAEL BRADY, appellant,

v.

THE CARTERET REALTY COMPANY et al., respondents.

[Argued March 6th, 1907. Decided June 17th, 1907.]

1. The clause in section 5 of the act to quiet titles (*3 Gen. Stat. p. 3487*), which enacts that when an issue at law shall be directed to try the validity of a claim of title to land, the court of chancery shall be bound by the result of such issue, is constitutional.

2. The previous determination in this case by this court that the power conferred upon the court of chancery to take jurisdiction of this class of suits and to award a feigned issue was not in conflict with the constitution, and the further determination that the order of the chancellor refusing a new trial of the issue should be affirmed involved and settled the constitutionality of the entire provision respecting a trial at law and the finality of the verdict thereon.

On appeal from a decree of the chancellor, whose opinion is reported in *68 N. J. Eq. (2 Robb.) 55*.

Mr. Ephraim Cutter and *Mr. Willard P. Voorhees*, for the appellant.

Messrs. Collins & Corbin, for the respondents.

The opinion of the court was delivered by

REED, J.

This appeal is a supplement to a previous appeal decided in this court, and reported in *70 N. J. Eq. (4 Robb.) 748*.

The former appeal brought up a refusal of the chancellor to order a new trial of a feigned issue after a verdict was returned for the realty company. On that appeal the jurisdiction of the court of chancery to direct a feigned issue was challenged on

*2 Buch.**Brady v. Carteret Realty Co.*

the ground that the parties were entitled to a jury trial in an action at law. The jurisdiction of the court to award such an issue was vindicated, the court holding that the legislature possessed the power to confer upon the court of chancery the right to entertain suits to quiet title, and that the power to award a feigned issue was an inherent incident of such a suit.

The court also affirmed upon its merits the order of the chancellor refusing to grant a new trial. Thereafter a decree was entered in favor of the realty company in conformity with the verdict of the jury. The present appeal is from the decree thus entered upon the verdict of that jury.

Brady now insists that, conceding the ability of the legislature to confer upon the court of chancery the right to entertain a suit to quiet title and to award a feigned issue therein, nevertheless the legislature had not the ability to bind the conscience of the chancellor by giving to the verdict rendered upon such feigned issue the quality of finality, save as to errors occurring in the trial.

The former appeal attacked this feature of the act to quiet title as one which stripped the courts of law of a faculty exclusively preserved to them by the constitution. This appeal challenges the constitutionality of the act on the ground that it deprives the court of chancery of one of its jurisdictional faculties secured by the constitution.

If the question now mooted can be regarded as still open in this case, we think that the appellant's insistence is entirely untenable. It goes without saying that the quality of finality given to the verdict by the statute strips the courts of common law of none of their faculties preserved to them by the constitution, nor is it perceived in what way it denudes the court of chancery of any of its powers as they existed at the time of the adoption of our constitution.

The bill in this case was not filed by the appellant for any relief which was administered by the court of chancery at that time. The bill was filed under the act to quiet title. The ground of relief was created by that act as well as the method of procedure. Although this suit is equitable in its nature, it was one

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unrecognized by the court of chancery previous to the enactment of the questioned statute.

Therefore the legislature, in providing for a trial at law upon demand of the party and for a conclusive verdict, deprived the court of chancery of none of its constitutional powers. Instead of depriving, it conferred a power, and the extent of that power, and the manner in which it should be exercised, was a question for legislative discretion.

Although an opinion is thus expressed upon the merits of the question, it is not to be admitted that, after the decision of the previous appeal, this question is now open for discussion in this court.

This court in the former decision recognized the verdict and the chancellor's order thereon as valid under the *Quia Timet* act. Those features of this statute were such a material part of the legislative scheme that it would seem impossible to declare that the statutory provisions for a verdict and for a review of the verdict were valid, and at the same time declare that the finality given to the verdict was a nullity. Finality is such an inseparable incident of the verdict that, if it is vicious, the whole provision for the verdict would be vicious.

The decree should be affirmed.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, REED, TRENCHARD, BOGERT, VROOM, GREEN, GRAY, DILL—12.

For reversal—None.

3 Buch.Ketchum v. Bell.

JOHN J. KETCHUM, appellant,

v.

HENRY G. BELL et al., respondents.

[Argued March 15th, 1907. Decided June 17th, 1907.]

Parties defendant in the actual possession of real property, while holding thereto the relation of mortgagees, are chargeable, on a bill filed to redeem, and for an accounting of rents and profits received, with the fair annual value of the premises so occupied as an occupation rent.

On appeal from a decree of the court of chancery.

In a suit brought by John J. Ketchum against Henry C. Bell and others to redeem mortgaged premises, setting up the execution of an absolute deed from complainant to defendant, accompanied by a written agreement by the latter to reconvey the premises and account for rents received, a decree was made July 10th, 1905, declaring that complainant was entitled to redeem, and that defendant should account for rents and profits received, and that the cause be referred to a special master to ascertain (to quote the pertinent words of the decree)

"the fair rental value of the part of the said premises actually occupied by the defendants, and the amount which has been received by the defendants for rents and profits of said premises from the twenty-fifth day of July, eighteen hundred and ninety-six, or which might have been received by them but for their willful default, and to charge them with the same; * * * and what shall be coming on account of said occupation and rents and profits is to be deducted out of what shall be found due to the defendants for principal and interest on said mortgage indebtedness, and said amounts paid by the defendants, and that what upon the balance of said account shall be found due to the defendants for said principal and interest and amounts so paid out by them for the complainant, the complainant do pay," &c.

The master, on May 10th, 1906, made his final report to the court of chancery, containing, *inter alia*, the following finding, viz.:

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"*First.* That there have been no rents and profits which might have been received by the defendants but for their willful default, and that they are therefore not chargeable with anything on that score.

"*Second.* I find that the fair rental value of the part of the said premises actually occupied by the defendants, and with which they should be chargeable, is as follows: For occupation of office-room, from August first, eighteen hundred and ninety-six, to January first, nineteen hundred and two, at sixty dollars a year, the sum of three hundred and twenty-five dollars."

In the striking of the balance the report fixes the net sum of \$8,699.36 as due to the defendants from the complainant, after allowing all credits due the latter on the 1st day of January, 1906. To this report the complainant filed certain exceptions, together with the following:

"*Second.* Because the master's report does not charge the defendants with occupation rent for an office-room of value of sixty dollars (\$60) a year for nine years and five months," &c.

Subsequently, on June 4th, 1906, the court of chancery, by the second and final decree, ordered that all the exceptions of the complainant be overruled and disallowed, and the master's report be approved and confirmed. From this last decree the complainant has appealed.

Mr. John J. Ketchum, for the appellant, *pro se*.

Mr. Addison Ely, for the respondents.

The opinion of the court was delivered by

VREDENBURGH, J. (after reciting as above).

Among the exceptions presented for review is the correctness of the master's report, and the decree confirming it, in refusing to charge the defendants with the occupation rent during the entire period of their occupancy of the office-room in controversy. While the master, correctly, we think, under the evidence before him, fixed the fair yearly rental value at \$60 a year (\$5 per month) for the room occupied by defendants, he has limited the period of such liability for occupancy to January 1st, 1902.

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We think the testimony, not seriously questioned nor controverted below, impels the conclusion that the defendants are also chargeable for such occupation rent for a longer period, namely, from January 1st, 1902, to the date of the master's final report. Specification at length of this testimony here is unnecessary. The complainant, in substance, testified that the defendant association had possession of a room or office in the complainant's building from August, 1896, until the date of the hearing before the master; that the defendants carried on the business of selling trusses for the relief of persons suffering from hernia in such room, and that such business was conducted there from the latter part of the year 1896 continuously up to the time of the giving of his testimony. In this he was supported, to some extent, by the defendant Bell himself, and also by the defendants' clerk and witness, Stoddard, who sustained complainant's statements, testifying that the stock of trusses was so arranged and used in this room upon shelving (put up by him there permanently) that when a person applied to him for trusses he could go to the shelves and get the exact number and size wanted, and fit such person with the requisite truss. This evidence was, we think, sufficient to establish the fact of the nature, duration and continuity of defendants' possession and use of the premises in question. The defendants' legal and equitable situation under the deed and contemporaneous written agreement to reconvey is analogous to that of a mortgagee in possession of the mortgaged premises. That the deed and agreement, construed together, constituted a mortgage on the premises was not disputed before the court below. The respondent's counsel, in his brief before this court, concedes that such effect was there "freely admitted," and does not controvert it in his brief in this court.

The equitable rule is indisputably settled that such a grantee in actual possession is chargeable as a mortgagee in possession with reasonable rent, or the fair annual value of the occupied premises as an occupation rent. 1 *Hilliard Mort.* 450; 3 *Pom. Eq. Jur.* § 1216, and cases cited in note 2 at bottom; *Dawson v. Drake*, 30 *N. J. Eq.* (3 *Stew.*) 601; *S. C.*, on appeal, 30 *N. J. Eq.* (3 *Stew.*) 733; *Demarest v. Berry*, 16 *N. J. Eq.* (1 *C. E.*

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Gr.) 481; *Leeds v. Gifford*, 41 N. J. Eq. (14 Stew.) 464; *Moore v. Degraw*, 5 N. J. Eq. (1 Halst.) 346; 4 Kent Com. 165.

The other exceptions under review we think were properly decided below, but the complainant's exception to the master's report to the extent above indicated should have been sustained.

The decree appealed from should be reversed.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

JOHN VANDERBILT, appellant,

v.

HENRY MITCHELL, medical superintendent; MYRA L. J. VANDERBILT and WILLIAM GODFREY VANDERBILT, respondents.

[Argued March 18th, 1907. Decided June 17th, 1907.]

1. A certificate of birth, declared by section 13 of the act of 1888 (P. L. 1888 p. 52) to be entitled to be received in evidence to prove the facts therein contained, was placed of record with the medical superintendent of the bureau of vital statistics. The certificate was made by the physician present at the birth of the child, and, as required by said statute, among other things set forth, as far as the facts could be ascertained by him, the date and place of birth of the child, the name of each of the parents, the maiden name of the mother and the name of the child. In making the certificate the physician was imposed upon by the false statements of the mother as to the paternity of the child, and certified, contrary to the fact, that the complainant was the father of the child.—*Held*, that a court of equity has jurisdiction (1) to cancel such false certificate, or so much thereof as relates to and charges upon the complainant the paternity of the child; (2) to require the medical superintendent of the bureau of vital statistics to endorse the fact of the cancellation

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upon the record; (3) to enjoin the use of the original certificate, or copies thereof, as evidence; and (4) to enjoin the mother and the child from claiming for said child, by virtue of said certificate, the status of a lawfully-begotten child of the complainant.

2. Principles on which equitable jurisdiction is entertained in cases of this nature discussed.

3. *Vanderbilt v. Mitchell*, 71 N. J. Eq. (1 Buch.) 632, reversed.

On appeal from a decree of the court of chancery advised by Vice-Chancellor Garrison, whose opinion is reported in 71 N. J. Eq. (1 Buch.) 632.

The bill in this case is filed by John Vanderbilt against Myra L. J. Vanderbilt, his wife, William Godfrey Vanderbilt, an infant, appearing herein by guardian, and Henry Mitchell, as medical superintendent of the bureau of vital statistics of the State of New Jersey.

The complainant charges that he is the husband of the defendant Myra L. J. Vanderbilt; that they were married in this state in February, 1901, and then were, and are now, residents of this state; that they lived together as man and wife for two months after the marriage, and no longer; that from September, 1901, to July, 1903, the wife and a third party named lived together in adultery at a place designated in the bill, and that during said period complainant had no matrimonial access to his wife; that as a result of the adulterous intercourse there was born to the said wife, in the State of New Jersey, on or about the 20th day of October, 1903, a male child, by her named William Godfrey Vanderbilt, which infant is one of the defendants herein; that the complainant is not the father of the child, but that the infant is an adulterine bastard.

The bill charges that the defendant Myra L. J. Vanderbilt, upon the birth of said infant, falsely stated to the attending physician that the complainant was the father of the child, and that the child was the lawful issue of said marriage between herself and the complainant; that she made these false statements to induce the physician to insert them in the birth certificate, which the physician did, transmitting the certificate to the bureau of vital statistics, where it was duly filed and recorded.

The further allegation is that the defendant Myra L. J. Vanderbilt, by *ex parte* statements, created a public record false in fact, but evidential "in any court of this state to prove" that the complainant is the father of the infant defendant; that under and by virtue of this fraudulent record both the mother, and the child through its mother, assert and seek to maintain for the said child all the rights of a legitimate son of the complainant, and to enforce all the liability of the complainant to the said infant, as if he were the lawfully-begotten son of the complainant.

The bill also avers, in adequate terms, the existence of a testamentary trust created by the mother of the complainant, by the terms of which certain real property in the State of New York is vested in certain trustees, from which the complainant receives an income during the lifetime of his nephew and his niece, and at the decease of both the nephew and the niece, under the provisions of the existing trust as stated in the bill, the *corpus* of the estate is to be distributed to certain persons, in which distribution the complainant, if alive at the time, or otherwise his lawful heirs or devisees, would share.

The allegation is that the complainant is sick, infirm and stricken with a fatal illness, and that it is the purpose of the defendants, the wife and the infant, to use this record, false in fact, after the death of the complainant and loss of testimony, to enable the infant to assert his claims to property as the lawful heir of the complainant.

+ The relief sought is the cancellation of this fraudulent record and the destruction of its evidential character as to the paternity of the infant; in effect, a decree of nullity as to this status of parentage thus *prima facie* created and fraudulently recorded against the complainant. The complainant seeks a permanent injunction restraining both the mother and the child from claiming, under this certificate, for the said child, the status, name, property or privilege of a lawfully-begotten child of the complainant.

An injunction is also prayed for against the issuing, by the state medical superintendent, of copies of this fraudulent record, and against Myra L. J. Vanderbilt and William Godfrey Vanderbilt from using or offering in evidence the record, or certified

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copies thereof, or in any way availing themselves of its evidential character.

The court below sustained a demurrer to the bill, on the ground that the case did not fall within any recognized head of equity jurisprudence, that no property right is shown to be involved, and that a court of equity could not take cognizance of personal rights or redress personal wrongs not affecting property.

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Messrs. McDermott & Enright, for the appellant.

Mr. Leroy A. Gibby and *Mr. Harry V. Osborne*, for the respondents.

The opinion of the court was delivered by

DILL, J.

No one of the allegations of the bill of complaint presents an exception to the general rule that the facts alleged must be regarded as admitted under a demurrer, as must all the facts which can be implied by a reasonable and fair intendment.

A court of equity is the only tribunal which can afford adequate relief to the complainant under the peculiar and somewhat novel circumstances of this case, and that regardless of whether *certiorari* or *mandamus* would afford him relief in certain respects.

The complainant properly invokes the aid of a court of equity, on the ground of its inherent jurisdiction over frauds, to annul and cancel a fraudulent certificate, based upon the false statements of the wife as to the paternity of the child, filed by a public officer, which certificate, by force of the statute, has such evidential character that it is *prima facie* evidence of the facts therein contained, and which, unless attacked by competent evidence, becomes conclusive to prove the facts therein recorded.

As we view the *gravamen* of the bill, the complainant does not seek a decree dissolving any existing valid status, thereby altering the actual relation of the parties, but a judicial determination of the matter of the alleged status of paternity *prima facie*

created by this certificate, to determine that such alleged status does not exist and to give adequate relief.

In other words, the theory upon which the equity of the bill rests is not to establish a status, or, on the other hand, to dis-establish a status, except for the special object of determining whether the information given to the physician by the wife was fraudulent, and whether thereupon the certificate itself, so far as it imputes to the complainant the paternity of the child, was fraudulent.

The relief sought is a decree expunging from the public records of this state, on the ground of fraud, the certificate of birth, or so much thereof as relates to and charges upon the complainant the paternity of the child, with an injunction against all parties who might issue copies or use such copies or the original certificate as evidence of such paternity.

The character of the recorded certificate, by whom prepared and filed, and its force and effect as evidence, are fixed by statute. *P. L. 1888 p. 52.* See, also, *P. L. 1900 p. 370 ch. 150 §§ 23, 29.*

The act of 1888, requiring the filing of certificates of birth, makes it the duty of the attending physician, within thirty days after a birth, to make, and cause to be transmitted to the superintendent of the bureau of vital statistics, a certificate thereof, which certificate shall set forth particularly, as far as the facts can be obtained by the physician, among other things, the date and place of birth, the name of each of the parents, the maiden name of the mother, the name of the child, and the name of the attending physician, and by section 13 of this act it is provided that

"any such original certificate, or any copy thereof certified to be a true copy under the hand of said medical superintendent, shall be received in evidence in any court of this state to prove the facts therein contained."

It is important to note that the legislature evidently had not in mind the possibility that this statutory record might be made an instrument to effectuate a fraud. Section 11 of the act of 1888 (*P. L. 1888 p. 59*) provides that any minister of the gospel, magistrate, physician, midwife, or other person, who shall knowingly make any false certificate of marriage, birth or death,

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shall be deemed guilty of a misdemeanor, but there is an absence of statutory provision for the correction, modification or annulment of the record in case either of fraud or mistake.

As to the force and effect of the certificate, whether it is an adjudication by the physician of the facts which it recites, or whether it is a mere statement by such physician of facts which have been recited to him, is unnecessary for us to determine. If it be an adjudication, then, so far as the determination of the father of the child is concerned, it was obtained by a false representation made to the officer by the mother. If, on the other hand, it is a mere recital by the physician of a statement made to him by the mother, then that false statement has, by force of the statute, become spread upon the record of the state as the truth.

In either event, the complainant has been fraudulently recorded as the father of this child, and the recorded statement is evidential against him in all matters where the question of the paternity of the child is involved. In an action to compel him to support the child, or an action for necessities furnished to the child, a certified copy of this record would be *prima facie* evidence that would tend to establish his liability, not only in this state, but in other jurisdictions as well. Speaking generally, this certificate is also evidence upon the question of who shall inherit an individual's estate, a question of vital importance to every man, having also a direct bearing upon the possible issue of a second marriage should he desire to contract one. But with this topic we deal later.

Upon the question of equity jurisdiction it may be said that the jurisdiction of a court of equity to cancel, annul and set aside judgments on the ground of fraud, as well as certificates and determinations of public officers charged with judicial or executive functions, is settled.

The principle is well stated in *Johnson v. Towsley*, 13 Wall. (U. S.) 72, as follows:

"There has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong, in both judicial and executive action, however solemn the form which the result of that action may

assume, when it invades private rights, and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted."

It was held in *Garland v. Wynn*, 20 How. (U. S.) 6, that courts of equity have power to review a contested claim to a right of entry to land under the Preemption laws, and to set aside the decisions of the register and receiver, confirmed by the commissioner in a case where they have been imposed upon by false swearing.

Jurisdiction in equity was also entertained to set aside an adjudication of a register authorizing an entry upon land on proof "showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation." *Lytle v. State of Arkansas*, 22 How. (U. S.) 193. See, also, *Dringer v. Receiver of Erie Railway*, 42 N. J. Eq. (15 Stew.) 573; *Kirkpatrick v. Corning*, 40 N. J. Eq. (13 Stew.) 241.

Where a public record is pronounced fraudulent, the relief is not confined to an injunction forbidding its use, but the decree may direct a cancellation of the record upon the face thereof. *Fenton v. Way*, 44 Iowa 438; *Jones v. Porter*, 59 Miss. 628; *Randozzo v. Roppolo*, *post*.

An officer making or having in his possession the record may be made a party to a suit to set it aside, although he is not charged with any fraud and is faithfully performing his public duties, and may be enjoined by the decree.

In *McClurg v. Terry*, 21 N. J. Eq. (6 C. E. Gr.) 225, the complainant sought a decree declaring that there was no marriage. The justice of the peace "meditated returning a certificate of the marriage to be recorded before the proper officer." The bill sought not only "to have the marriage declared a nullity," but also "to restrain the justice from certifying it for record" (p. 227).

It may be conceded that the public officer has faithfully performed his public duties, and yet the certificate or determination

or patent or judgment may be tainted with fraud by the iniquity of private parties.

The jurisdiction of the court of chancery in cases of fraud is as broad and far-reaching as the forms, the devices and the ramifications of fraud can extend, and no public record will be allowed to stand as evidential in the face of facts showing in a direct proceeding in a court of equity that the certificate is false, conceived in fraud and with deliberate intent to use it in the future to wrongfully establish the paternity of a child, create a liability for maintenance and support, and rob the lawful heirs of a decedent of their inheritance.

If the court has jurisdiction to set aside adjudications of judicial officers on the ground of fraud, it necessarily follows that a public record, the essential facts of which are obtained by *ex parte* statements, without the sanction of an oath, and prepared by an officer, whether performing a ministerial or judicial function, may be annulled and rendered innocuous by a decree of a court of chancery, especially where private rights are invaded and where the forms of law are used to perpetrate a fraud, establish an unfounded claim or injuriously affect or threaten future vested or contingent estates.

A well-recognized jurisdiction of a court of equity is to compel the surrender and cancellation of instruments, such as notes, where they have been procured by fraud. It cannot be that a court of equity has jurisdiction, on the ground of fraud, to compel the cancellation of an obligation for the payment of a specified sum of money, and has not the power to compel the cancellation of an instrument, by fraud made a public record, which unjustly places upon the complainant the burden of a *prima facie* status of paternity and exposes him to the liability to support and maintain the infant.

The complainant is entitled to be relieved of the fictitious status of father so far as it is *prima facie* created by this certificate, and which may reasonably be presumed to impose burdens upon him, both present and future. To prevent the injustice of his being forced to pay unfounded claims out of property either acquired or to be acquired, and to obviate the necessity, on the part of the complainant or his heirs, of meeting from

time to time, in various suits and proceedings, this same issue, viz., the validity and evidential force of this certificate, equity interferes *in presenti*, on the doctrine of *quia timet*, that at some time in the future, after the death or departure of witnesses or other loss of evidence, the party or his privies may be menaced by the outstanding instrument.

The effect of a decree of nullity in this case, when entered upon the record, would be notice to all the world that this public record was fraudulent and was not entitled to be received in evidence in any court of this state to prove the facts therein contained, or entitled to full faith and credit in other states under the federal constitution.

The question in this case is not whether the court of chancery would have power, upon a bill properly framed, to determine that the complainant was not the father of the child, so as to preclude forever a trial of that question. The issue here is narrower, and the effect of a decree cancelling the birth certificate, finding that the statements of the wife to the physician that the complainant was the father of the child were false, would not forever preclude a trial of the question of paternity. The effect of the decree would be to destroy the evidential character of this certificate, so that no one would be entitled thereafter to use it as evidence upon such issue.

The equity, so far as we are now discussing it, stops with the destruction of the fraudulent piece of evidence and with an injunction against its use.

In this state, in the leading case of *Carris v. Carris*, 24 N. J. Eq. (9 C. E. Gr.) 516, the court of chancery is declared to have inherent jurisdiction to annul the status of marriage on the ground of fraud, entirely independent of the statute of New Jersey which regulates the subject of marriage and divorce. The same principle was followed by Chancellor Zabriskie in *McClurg v. Terry*, *supra*; by Vice-Chancellor Pitney in *Rooney v. Rooney*, 54 N. J. Eq. (9 Dick.) 231, and by the present chancellor in *Crane v. Crane*, 62 N. J. Eq. (17 Dick.) 21.

In these cases jurisdiction was assumed upon the ground that marriage is a civil contract and that courts of equity have always entertained suits to set aside contracts on the ground of fraud.

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We have referred to the doctrine of the *Carris Case*, and have cited with approval the *McClurg*, *Rooney* and *Crane Cases*, as illustrating the view which our courts take of the doctrine of equitable jurisdiction as contradistinguished from the narrower English rule.

The rule of the *Carris Case* has been generally followed in this country, but in England it has been discussed and squarely rejected. *Moss v. Moss*, *L. R. Prob. 263* (1897).

The court below held that the remedy of establishing and destroying personal status does not belong to the original jurisdiction of chancery, and, so far as it exists, is wholly of statutory origin. This is supported by certain English decisions, but is contrary to the principle laid down in the *Carris Case* and is not the law of this state.

Therefore, although this status of the complainant is an issue, the court of chancery, independent of any statute, has jurisdiction.

If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion, and we should declare that the complainant was entitled to relief, and to a decree establishing the truth as to the paternity of the child, relieving the complainant of the intolerable burden *prima facie* put upon him by the false record and preventing the wife from perpetuating a fraud upon the husband. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, adopting the dissenting opinion of Justice Gray, and rejecting the doctrine laid down by the majority in *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, a case seldom cited but to be disapproved, the force of which was subsequently removed by statute. *Laws of N. Y. 1903 p. 308 ch. 132.*

But it is not necessary to place the decision upon this ground, because there are sufficient facts presented to enable us to put this case upon the technical basis that the jurisdiction we are exercising is the protection of property rights, and to declare that

the complainant is entitled to restrain the unwarranted use of his name as the father of the child upon the ground that such action is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability.

In many cases courts have striven to uphold the equitable jurisdiction upon the ground of some property right, however slender and shadowy, and the tendency of the courts is to afford more adequate protection to personal rights and to that end to lay hold of slight circumstances tending to show a technical property right. See *note, 37 L. R. A. 787*.

It sufficiently appears that the complainant's property rights now existing, and the contingent interest of himself and of other parties, are seriously menaced by the unlawful and unwarranted use of the complainant's name as the father of the child in the recorded birth certificate.

† It is indisputable that the complainant is now subject to the risk of liability for the support and maintenance of the infant. If, through the mental incapacity of the complainant, or in case of his death, inability or neglect to produce evidence of facts as to the paternity of the child, the certificate of birth should not be contradicted, it would afford evidence of the facts therein contained and the complainant's liability would become fixed.

The complainant is confronted with the risk of prosecution during his lifetime, and with a strong probability of litigation over his will or his property in case of his death. If a court of equity may interfere to prevent the unlawful use of a person's name in a case where there is no evidence of actual fraud, how much more should the court assume jurisdiction in a case of actual fraud involving moral turpitude.

↓ The jurisdiction of a court of equity to interfere where there has been an unwarranted use of a man's name, the probable effect of which is to expose him to risk of future liability, has been sustained by authority. In England the court of chancery, even under the more restricted rule that there prevails, sustained an injunction to restrain the unauthorized use in a prospectus of a man's name as a trustee of a corporation. *Routh v. Webster, 10 Bear. 561*. The unauthorized use of the name of "The Times" newspaper in London was also restrained by parties engaged in

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the sale of cycles. *Walter v. Ashton*, L. R. 2 Ch. Div. 282 (1902).

In each of these cases an injunction was granted because the unauthorized use of the plaintiff's name was calculated to injure his property and to expose him to risk of future liability. In neither case was a present property right actually prejudiced, but only threatened and liability only anticipated.

In *Routh v. Webster*, *supra*, the master of the rolls, Lord Langdale, said:

"I think that the plaintiff is entitled to the injunction. I have no doubt that the plaintiff never did consent to be a trustee. * * * The name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee; his name was also used at the bankers; and though he may not be subjected to the duties of trustees, yet it is plain that he is exposed to some risk by the unauthorized act of the defendants in using his name."

In *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. Ap. Cas. 142 (1875), Lord Cairns approved *Routh v. Webster* in these words:

"That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the plaintiff might have been placed * * * are obvious, and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name."

In *Walter v. Ashton*, *supra*, Justice Bryne said:

"The principle is clear enough; the court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability, then, if I rightly understand the law of this court, an injunction is the proper remedy."

Furthermore, this case comes within the well-settled rule that a court of equity will prevent the threatened invasion of property rights and protect a party from exposure to the risk of litigation and liability.

It is clear that the complainant has a property interest under

his mother's will in certain specific real estate in New York City, consisting not only of an income for life, but of a vested remainder in a certain undivided share of the real estate in question.

This vested remainder is, under the real property law of New York, as a future estate, descendible, devisable and alienable in the same manner as an estate in possession. *Real Prop. L. (N. Y.)* §§ 26, 27, 30, 49.

There is more than a "tangible probability," to use the phrase employed in *Walter v. Ashton, supra*, that a claim will be made by or in behalf of the infant upon the estate of the complainant in the event of his death, whether he leaves a will or dies intestate. His right to make absolute disposition of his estate by will is menaced by the fraudulent record. His property is exposed to the risk of litigation after his death to the detriment of his lawful heirs.

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If he desires to leave his property, as an entirety, under the law of New York, where the land is situated, to charity, by making a devise to any benevolent or charitable society or institution his will may be attacked, not upon any ground of mental incapacity, but upon the ground that he has devoted more than one-half part of his estate to a charitable institution, in violation of the statute of New York, which prohibits such a disposition where a person leaves a husband, wife, child or parent. See *Rev. Stat. of N. Y. (Birdseye's ed., 1901, vol. 3) tit. "Wills," § 25 p. 4022*.

The *jus disponendi* of a testator is a property right (*O'Neill v. Supreme Council, American Legion of Honor, 70 N. J. Law (41 Vr.) 411*), and one which should be protected by a court of equity from a threatened or anticipated attack.

The court below suggested that the inherent power of a father to make a will would protect him against this contingency. With this we cannot agree. Courts not infrequently set aside wills on the application of heirs-at-law, and this infant defendant, in attacking the will of the complainant, might succeed in having it set aside on the ground of the complainant's insane delusion in believing him to be the son of another, as was attempted in the case of *Smith v. Smith, 48 N. J. Eq. (3 Dick.)*

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566, and might prove that this was a delusion by the production of the very record which is now attacked.

If he dies without lawful issue he may dispose of his property absolutely, but the New York statutory limitation above referred to, if he gave all of his estate to charity, might be used by the infant to invalidate his full intention, wholly independent of any question of mental incapacity or undue influence.

If he dies intestate, the child may institute an action of ejectment against his heirs, and subject them to litigation, when witnesses are dead or other evidence unavailable to contradict the certificate of birth.

The rights of his heirs-at-law should not be overlooked. The complainant is under the strongest moral obligation to leave no taint upon the inheritance, if by any act of his he can blot out the stain and prevent false and fraudulent claimants from obtaining possession of his property, to the exclusion of his relatives by blood.

The absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity.

The case presented is novel in incident, but not in principle; but it is no objection to the exercise of jurisdiction that in the ever-changing phases of social relations a new case is presented and new features of wrong are involved.

As said by Lord Hardwicke, in his letter to Lord Kames on the principles of equity, dated June 30th, 1759:

"Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." *Parkes' Hist. Ct. Ch.* 508.

Chancellor Cottenham, in *Wallworth v. Holt*, 4 Myl. & C. 619, said:

"I think it the duty of this court [meaning equity] to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to admin-

ister justice and enforce rights for which there is no other remedy."

Paraphrasing the language of Justice Herrick, in *Green Island Ice Co. v. Norton*, 105 App. Div. (N. Y.) 331, the jurisdiction of equity is constantly growing and expanding, and relief is now granted in cases where formerly the courts would not have thought for a moment of so doing. From time immemorial it has been the rule not to grant equitable relief where a party praying for it had an adequate remedy at law, but modern ideas of what are adequate remedies are changing and expanding, and it is gradually coming to be understood that a system of law which will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society.

As for precedents: In a New York case the defendant, having procured from his wife, by fraud, a confession on her part of adultery, commenced an action to divorce her, upon the ground of that adultery. The wife invoked the equitable jurisdiction of the court to restrain the use of such confession as evidence in the then pending divorce action. The statute of New York at that time forbade husbands and wives to be sworn as witnesses in actions for divorce upon the ground of adultery, and hence, the wife would not have been able, in the divorce action, to overcome the evidential effect of the written confession by showing that it was procured by fraud and duress. A demurrer was interposed in the equity suit, upon grounds similar to those urged here, viz., that there was no head of equity jurisdiction under which such relief could be granted, and that there was no basis for the interposition of equity to enjoin the use of the written confession, or any copies thereof, as evidence. The court overruled the demurrer, and the opinion of that eminent jurist, the late Mr. Justice Van Brunt, is not only interesting, but pertinent as holding to the contrary of the ruling below in the case at bar. The court held that novelty in incident was no barrier to equitable jurisdiction; that if such were the rule, gross injustice, under the guise of forms of law, might be perpetrated, and further, that it was quite within the power of a court

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of equity, in case of fraud, to broadly restrain the use of documents as evidence. *Callender v. Callender*, 53 How. Pr. (N. Y.) 364, 365; see *Meldrum v. Meldrum*, 11 L. R. A. 65, 70.

We find in New York also a case where a woman went through the form of a marriage ceremony with a man who personated the plaintiff. This was done at the instance of the woman. The priest performing such marriage ceremony filed his certificate of a marriage between the woman and the plaintiff with the bureau of vital statistics, and thereupon the woman obtained a transcript of such record, and caused the same to be lodged and filed with the authorities in the province of the plaintiff's birth in Italy. The purpose of the woman was to claim, at some time in the future, to be the plaintiff's wife, or his widow after his death. These were the findings of fact of the supreme court.

The plaintiff brought his action in equity, and made parties defendant the woman, Francesca Roppolo, and Thomas Darlington, as commissioner of health of the city of New York, who was, under the law of New York, the custodian of the records of marriages.

The statute of New York relating to the making and filing of marriage certificates (2 *Birdseye's Rev. Stat.* 2810 § 22, as amended by the *Laws of 1904 p. 991 ch. 392*) is, in essential particulars, the same as the statute of New Jersey (*P. L. 1888 p. 52*), and the marriage certificate had practically the same evidential character as the birth certificate in this case.

The supreme court held (opinion by Justice Maddox) that the case was within the jurisdiction of a court of equity, and judicially determined and decreed that the plaintiff was not, as stated in the certificate filed, married to the defendant; that, as to the plaintiff, the pretended marriage was a nullity; that

"the defendant Francesca Roppolo be and she hereby is perpetually restrained and enjoined from claiming or representing herself to be the wife of the plaintiff herein, or from claiming any right and interest in and to his property and estate; * * * the defendant Thomas Darlington, as commissioner of health of the city of New York, be and he hereby is directed to endorse upon the said certificate of marriage a reference to this decree." *Randozzo v. Roppolo* (*New York Supreme Court, Kings County*), not yet reported; judgment entered July 14th, 1906.

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This case carries with it not only the weight of a precedent, but shows the tendency of courts of equity to intervene to prevent the infringement of personal rights.

Finally, the technical basis of the jurisdiction we are exercising is the protection of property rights. The equitable character of the action itself requires us to regard comparatively remote and trifling interferences with such property rights in the light of the great and immediate interference with the personal rights of the complainant, although, as we have already stated, whether this bill might not be rested on such personal basis alone, without reference to the technical protection of property, is not now decided, because the present case does present the property feature to an extent sufficient to satisfy even the rule adopted by the court below.

Upon the whole case, we are of the opinion that the court of chancery has jurisdiction to afford the complainant ample and complete relief, as already indicated in this opinion; that, should the court of chancery refuse relief under the circumstances stated in the bill, it would cease to be a court of equity governed by principles of natural justice, especially where property rights may be said to be threatened and personal rights are clearly invaded.

The decree sustaining the demurrer is reversed.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDBURGH, VROOM, GREEN, GRAY, DILL—14.

2 Buch.Vanderbilt v. Mitchell.

OLIVER DEG. VANDERBILT, appellant,

v.

HENRY MITCHELL, medical superintendent; MYRA L. J. VANDERBILT and WILLIAM GODFREY VANDERBILT, respondents.

[Submitted March 18th, 1907. Decided June 17th, 1907.]

One who would be entitled to a portion of an estate in the event of his brother's dying without lawful issue may maintain a bill in equity to cancel a certificate of birth which falsely stated that a certain infant was the lawful son of his brother, the certificate being procured by the fraud and false statements of the mother. See *John Vanderbilt v. Henry Mitchell et al.*, decided June 17th, 1907.

On appeal from a decree of the court of chancery advised by Vice-Chancellor Garrison, whose opinion is reported in 71 *N. J. Eq.* (1 Buch.) 632.

Messrs. McDermott & Enright, for the complainant-appellant.

Mr. Leroy A. Gibby and *Mr. Harry V. Osborne*, for the defendants-respondents.

The opinion of the court was delivered by

DILL, J.

The decree appealed from is reversed, for the reasons set forth in the opinion in the case of *John Vanderbilt* against the same defendants. The charges in this bill are practically identical with those in the *John Vanderbilt Case*. The only difference between the bills is as to the relation of the complainant to the cause of action.

The complainant in this suit is the brother of *John Vanderbilt*, and one of the beneficiaries under the testamentary trust described in the bill.

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The complainant has a vested remainder, under his mother's will, in his individual right, and a contingent interest in the event of the death of his brother, John, without lawful issue.

The false certificate in question is liable to affect the interest to be acquired by the complainant in the future by its use as evidence in some suit or proceeding by the infant. Therefore, a property right to be acquired in the future by the complainant is threatened.

Inasmuch as the complainant is not in possession of the property, and rights to be acquired rather than at present acquired are threatened, his only effectual remedy must at this time be by a bill in equity. Otherwise he might be without adequate relief.

The principle is well stated by the supreme court of Massachusetts, as follows:

"Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceeding at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require." *Martin v. Graves*, 5 Allen (87 Mass.) 601, 602.

The decree sustaining the demurrer is reversed.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

2 Buch. McNab & Harlin Mfg. Co. v. Paterson Building Co.

THE McNAB & HARLIN MANUFACTURING COMPANY, complainant,

v.

THE PATERSON BUILDING COMPANY et al., defendants.

[Submitted March 26th, 1907. Decided June 17th, 1907.]

The case of *Beckhard v. Rudolph*, 68 N. J. Eq. (2 Robb.) 740, reaffirmed and applied.

Appeal of Thomas F. McCran, receiver of the Paterson Building Company.

On appeal from a decree of the court of chancery, in interpleader suit, advised by Vice-Chancellor Stevenson, whose opinion is reported in 71 N. J. Eq. (1 Buch.) 133.

Mr. Edward F. Merrey, for the appellant Thomas F. McCran, receiver.

Mr. Francis Scott, for the respondent Martin Goble.

Mr. James G. Blauvelt, for the respondent the G. Drouve Company.

Messrs. Brinkerhoff & Fielder, for the respondents Collins, Lavery & Company.

The opinion of the court was delivered by

DILL, J.

The Paterson Building Company, a corporation of New Jersey, pursuant to a written contract, duly filed, undertook to erect a building for the McNab & Harlin Manufacturing Company, a New York corporation, but before the completion of the building

the Paterson Building Company became insolvent, a receiver was appointed, and thereupon materialmen and laborers filed claims against the amount in the hands of the McNab & Harlin Manufacturing Company due to the Paterson Building Company. The McNab & Harlin Manufacturing Company then brought this action of interpleader, and after due proceedings, and under a decree, the fund was paid into court.

The various parties who filed stop notices against the fund, pursuant to section 3 of the Mechanics' Lien law (*P. L. 1898 p. 538*), were brought in and answered, setting up their respective claims against the fund.

From the adjudication upon these claims by the vice-chancellor the receiver of the Paterson Building Company appeals, seeking to reverse the decision of the court below so far as it allowed three claims, namely, that of the G. Drouve Company, that of Martin Goble, and that of Collins, Lavery & Company.

1. *The Claim of the G. Drouve Company.*—The claim of this company was for furnishing and installing a system of bars and levers which constitute a device for opening and closing the windows in the building in question. The notice served specified a claim "for labor and materials," and the insistence of the appellant is that the stop notice is invalid, and creates no lien because the claim is stated to be for labor and materials furnished.

In *Beckhard v. Rudolph*, *supra*, this court declared a notice, practically identical with the one before us, to be good, and held that under section 3 of the Mechanics' Lien law the remedy by stop notice is open to a party who, under employment by or contract with the contractor, has supplied fixtures and other materials in the building, and that there was properly included in the claim the work of installation as part of the cost of the materials *in situ*.

This decision is therefore applicable to the present case, and the claim was properly allowed by the vice-chancellor.

2. *The Claim of Martin Goble.*—The appellant's objection is that the stop notice did not specifically state that the materials were actually used in the building. The notice was: "This is to notify you that I have sold to the Paterson Building Com-

2 Buch. McNab & Harlin Mfg. Co. v. Paterson Building Co.

pany, for your building on Straight street, Paterson, N. J., materials to the amount of," &c. This is in effect an averment that the materials were used in the building. That such was the case in point of fact is settled by the stipulation in the case.

The appellant's objection to this claim is therefore untenable.

3. *The Claim of Collins, Lavery & Company.*—The notice in this case consists of three documents, all of which were served together. The first was an order upon the McNab & Harlin Manufacturing Company by the Paterson Building Company, in favor of Collins, Lavery & Company, for \$540.52. The second, an assignment made by certain individuals, described as trading under the name of the Paterson Building Company, transferring to Collins, Lavery & Company, out of the moneys due to the Paterson Building Company from the McNab & Harlin Manufacturing Company, for work done and materials furnished by Collins, Lavery & Company, and used in the erection and construction of the building, the sum of \$540.52. The third, a notice stating that there was due from the Paterson Building Company to Collins, Lavery & Company

"the sum of five hundred and forty dollars and fifty-two cents by you, the said owner, used and employed in the erecting and constructing of your said building; that we have demanded payment," &c.

In this paper there is manifest omission of the words "for material furnished and" after the words "five hundred and forty dollars and fifty-two cents."

This latter notice, standing alone, might be insufficient to entitle the parties to the benefit of the third section of the Mechanics' Lien law, but taking the three papers together they convey notice in writing to the McNab & Harlin Manufacturing Company of the essentials required by section 3 of the act. That the Paterson Building Company was described as a partnership instead of a corporation is not of consequence.

This claim, therefore, was also properly sustained.

For the reasons above stated, we have concurred in the decision of the court below in sustaining the validity of all the claims in question.

The appellant's counsel, however, relies upon the reasoning of the opinion below to reverse the vice-chancellor's decision based

thereon, and says in his brief that if the reasoning of the vice-chancellor "is sound, this court should reverse its ruling in the *Beckhard Case*."

We have carefully examined the elaborate and interesting opinion of the learned vice-chancellor who heard this case, but a thoughtful review of his opinion and of the brief of the appellant confirms our judgment in the clearness and soundness of the views expressed in the unanimous opinion of this court in *Beckhard v. Rudolph, supra*.

The *Beckhard Case* deals with the construction of section 3 of the Mechanics' Lien law (*P. L. 1898 p. 538*), and does not purport to lay down a general rule applicable to the construction of all the other provisions of our Mechanics' Lien laws.

The question whether other provisions of our Mechanics' Lien law should be construed liberally or otherwise is not foreclosed by the decision in the *Beckhard Case*, nor by this decision. It may be argued, and with force, that Mechanics' Lien laws are, as a rule, to be construed strictly against the claimant and in favor of the owner of the land in so far as they require the owner to pay a debt that he did not contract and for a consideration that he may have already paid to the contractor.

But, in our opinion, no such strict construction should be given to the provisions of the third section of our Mechanics' Lien law. *P. L. 1898 p. 538*.

There is no reason for a strict construction of the provisions of this section beyond the inconvenience to which the owner is put by making the inquiry into the correctness of the claims served upon him. His possible costs of litigation in an interpleader suit are presumably covered by the bill of costs and counsel fees allowed to him.

For these reasons the decree appealed from should be affirmed in all its parts.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

2 Buch.International Silver Co. v. Rogers.

INTERNATIONAL SILVER COMPANY, appellant,

v.

WILLIAM H. ROGERS, respondent.

[Argued March 19th, 1907. Decided June 17th, 1907.]

1. Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name.

2. Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, is an artifice calculated to produce the confusion alluded to.

3. While a personal name may not constitute a technical trade mark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact.

4. Where a man's conduct has been such that he cannot engage in a particular business, even in his own name, without profiting by his prior fraud, to the detriment of another's trade, he must so distinguish his name as to avoid confusion. The words "Not connected with any other of the same name," or words of similar import, do not suffice.

On appeal from a decree of the court of chancery advised by Vice-Chancellor Stevens, whose opinion is reported in 71 *N. J. Eq.* (1 Buch.) 560.

Messrs. Edward A. & William T. Day and Mr. John P. Bartlett (of the New York bar), for the appellant.

Mr. Craig A. Marsh, for the respondent.

The opinion of the court was delivered by

TRENCHARD, J.

This is an appeal from a decree of the court of chancery.

The suit is a continuation of the litigation heretofore carried on by the International Silver Company against the William H. Rogers Corporation, and reported in 66 *N. J. Eq.* (21 *Dick.*) 119, and on appeal in 67 *N. J. Eq.* (1 *Robb.*) 646.

The decree in that case was directed against the William H. Rogers Corporation, and its officers and directors, and enjoined them from making and selling silver-plated flat ware under the corporate name of "Wm. H. Rogers Corporation" or under the name of "Wm. H. Rogers," or under any name of which the word "Rogers" is a part.

This suit has to do with occurrences since the rendition of that decree.

After that decree, and on or about April 6th, 1905, the William H. Rogers Corporation changed its name to "Plainfield Silver Plate Company," and continued to carry on the business under its new name until May 25th, 1905, when it went out of business. The defendant, who was in control of the stock of the company, and was its president, purchased from it all its unplated blanks, its machinery, tools and fixtures of every kind, its lease on its office and factory, and proceeded to carry on the same business in which it had embarked, under his own name of W. H. Rogers. He now stamps his manufactured goods (his knives, forks and spoons) with the words "W. H. Rogers of Plainfield, N. J.," and marks his packages "Not connected with any other Rogers."

Upon this state of facts the complainant filed its bill of complaint, in the nature of a supplemental bill, against the defendant for an injunction, and the case came on before the vice-chancellor on the bill, answer and proofs taken in the cause and the record and testimony of the former case. The vice-chancellor dismissed the bill.

In its bill the complainant claims that the stamp which the defendant puts on his product, namely, the words "W. H. Rogers

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of Plainfield, N. J.," tends to produce confusion in the trade to the injury of complainant's business, and to the wrong of the public, and the complainant asks that he be enjoined from the further prosecution of his business, unless he stamps his product in such a way as to make it plain that it is not manufactured by the original William Rogers Company, to whose business the complainant was the successor.

The learned vice-chancellor thought the injunction should not go, holding that the defendant was under no obligation to do anything more than use his own name fairly; that the evidence showed no fraud, and that the mere fact that a competitor is, or may be, injured, is not material.

In that view we cannot concur.

Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the articles produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169; *Russia Cement Co. v. Le Page*, 147 Mass. 206; *Pillsbury v. Pillsbury*, 24 U. S. App. 395; *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 18 Beav. 209; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Howard v. Henriques*, 3 Sandf. 725; *Meneely v. Meneely*, 62 N. Y. 427; *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Coats v. Merrick Thread Co.*, 149 U. S. 562.

The leading case is *Singer Manufacturing Co. v. June Manufacturing Co.*, *supra*, in which Mr. Justice White, after affirming the doctrine above set forth and citing the cases which support it, declared: "Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice

calculated to produce the deception alluded to in the foregoing adjudications.”

That proposition finds support in the following cases: *Howe Scale Co. v. Wycoff, Seamans & Benedict*, 198 U. S. 118; *Walter Baker & Co. v. Baker*, 87 Fed. Rep. 209; *Centaur Company v. Link*, 62 N. J. Eq. (17 Dick.) 147; *Chickering v. Chickering*, 120 Fed. Rep. 69.

When this suit was originally before the court the vice-chancellor found that the name “Rogers” had acquired a secondary significance in connection with the manufacture of silverware. In his opinion, reported in 66 N. J. Eq. (21 Dick.) 120, he uses this language: “The complainant is the successor of several companies which have been engaged for many years in the manufacture of silver-plated ware, and which all derive their title from three brothers of the name of Rogers, who were among the first, if not the first, to apply the art of electroplating to its manufacture. They gained a reputation for their products, and the name ‘Rogers’ has acquired a secondary significance in connection therewith.”

That finding of fact is, in our judgment, fully warranted by the evidence.

While a personal name may not constitute a technical trade mark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact. *Williams v. Mitchell*, 106 Fed. Rep. 169; *Meyer v. Medicine Company*, 58 Fed. Rep. 884; *Baker v. Sanders*, 80 Fed. Rep. 889; *Allegretti v. Allegretti*, 52 N. E. Rep. 487; *Pillsbury v. Mills Company*, 64 Fed. Rep. 841; *Allegretti v. Keller*, 85 Fed. Rep. 643; *Raymond v. Powder Company*, 85 Fed. Rep. 231; *Mills Company v. Eagle*, 86 Fed. Rep. 608.

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The normal presumption that the use of one's own name is an honest one may be rebutted by showing a prior fraudulent use of it touching the matter in issue. Such prior fraudulent use of the defendant's name in connection with the manufacture and sale of silverware is established in this case by the testimony herein and the record of the original suit. The burden is therefore on the defendant to show that the use of his name is not in effect a continuation of such prior fraud. The defendant has not only failed to sustain this burden, but, on the contrary, the testimony in the present case abundantly shows that the defendant has acquired by purchase and is enjoying the results of a business which was built up in fraud of the complainant; it had been established by the corporation which bore his name, and a certain part of its success, at least, was due to the fact that it was getting the benefit of the reputation achieved by the original Rogers people, to the good will of whose business the complainant had succeeded. That benefit he must continue to receive while carrying on this same business in his own name, unless the public are enabled to certainly know that the goods which he puts upon the market are not the goods of the complainant or its predecessors.

The defendant contends that he distinguished his goods by stamping on them the words, "W. H. Rogers of Plainfield, N. J." The alleged distinguishing words are "of Plainfield, N. J." But that is no distinguishing mark. As the history of the "Rogers" name in connection with silver-plated ware shows, there were several places where the art was carried on and the "Rogers" mark was lawfully used. Locality has no sufficiently distinguishing force, because locality is not associated in any way with the mark itself. It is the word "Rogers" that is all controlling, and it is that which should be differentiated in order to effectually distinguish the goods.

In *Baker v. Sanders*, 80 Fed. Rep. 889, 895, the defendant (in lieu of more extended changes) was required to affix the statement that "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company."

In the case of *Allegretti v. Allegretti, supra*, in the supreme court of Illinois, the court enjoined the defendants against the use of the name "Allegretti" except in a manner indicating that the defendants' goods are "Manufactured and sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate-Cream Company."

In cases like the present one, it is elementary that the person to be considered is not the jobber or wholesaler, but the ordinary purchaser at retail. This being so the marks "Not connected with any other Rogers" which are put upon the boxes, packages and wrappers, and which do not reach the purchaser at the retail shops, afford no means to the retail purchaser of distinguishing the defendant's product from that of the complainant. Under the circumstances of the present case it was the duty of the defendant to so distinguish the silverware made by him that it could not be mistaken for the silverware known to the world as the "Rogers" ware.

The words, "Not connected with any other Rogers," even if they reached the retail purchaser, would not suffice for that purpose. Those words merely tend to add to the confusion. They might well be, and usually would be, employed by an original manufacturer seeking to warn the trade when he finds on the market other goods which may be passed off as his. They would be the appropriate announcement of an original maker that he has no connection with other wares of similar appearance or wares put out under a similar name. These words also afford an unscrupulous retail dealer opportunity to pass off the product as the original "Rogers" goods. In employing such words, so misleading and ambiguous, the defendant is clearly guilty of bad faith.

The defendant having failed in the performance of his duty so to distinguish his silverware that it could not be mistaken for that of the complainant, we think the complainant is entitled to have an injunction restraining the defendant from manufacturing and selling his goods unless he stamps upon them the words, "Not the original Rogers" or "Not connected with the original Rogers." As was said in *Allegretti v. Kellar, supra*, this

2 Buch.Small v. Pryor.

"saves the complainant's rights and works no hardship to an honest defendant."

The decree must therefore be reversed and the record remitted to the court of chancery in order that a decree may be made in accordance with this opinion. The complainant is entitled to costs in the court of chancery and in this court.

For affirmance—FORT, HENDRICKSON, BOGERT—3.

For reversal—THE CHIEF-JUSTICE, GARRISON, PITNEY, SWAYZE, REED, TRENCHARD, VREDENBURGH, VROOM, GREEN, GRAY, DILL—11.

BRIDGET SMALL et al., respondents,

v.

CATHARINE PRYOR et al., appellants.

[Argued March 6th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Emery, whose opinion is reported in 69 *N. J. Eq.* (3 *Robb.*) 606.

Mr. Edward Nugent, for the appellants.

Mr. Patrick H. Gilhooly, for the respondents.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons stated in the opinion filed by Vice-Chancellor Emery in the court below.

Duke v. Duke.

72 Eq.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VROOM, GREEN, GRAY, DILL—13.

For reversal—None.

JAMES B. DUKE, respondent,

v.

LILIAN N. DUKE, appellant.

[Decided February 4th, 1907.]

On appeal from a decree overruling the plea to the jurisdiction, advised by Vice-Chancellor Pitney, whose opinion is reported in 70 N. J. Eq. (4 Robb.) 135.

Mr. Chauncey G. Parker and Mr. Samuel Kalisch, for the appellant.

Mr. Richard V. Lindabury, for the respondent.

PER CURIAM.

The order appealed from in this case is affirmed, for the reasons stated in the opinion filed in the court of chancery by Vice-Chancellor Pitney.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, GARRETSON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—15.

For reversal—None.

*2 Buch.**Duke v. Duke.*

JAMES B. DUKE, respondent,

v.

LILIAN N. DUKE, appellant.

[Argued March 8th, 1907. Decided June 17th, 1907.]

On appeal of Lilian N. Duke from a decree of the court of chancery granting the respondent a divorce, advised by Vice-Chancellor Pitney, whose opinion is reported *ante p. 515*.

Mr. Chauncey G. Parker and *Mr. Samuel Kalisch*, for the appellant.

Mr. Alvah A. Clark and *Mr. Richard V. Lindabury*, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons stated in the opinion of Vice-Chancellor Pitney, delivered in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

Duke v. Duke.

72 Eq.

JAMES B. DUKE, respondent,

v.

LILIAN N. DUKE, appellant, and FRANK T. HUNTOON, intervenor and appellant.

[Argued March 8th, 1907. Decided June 17th, 1907.]

On appeal of Frank T. Huntoon, intervenor, from a decree of the court of chancery adjudging him guilty, advised by Vice-Chancellor Pitney, whose opinion is reported *ante p. 515*.

Mr. Alan H. Strong, for the intervenor.

Mr. Alvah A. Clark and *Mr. Richard V. Lindabury*, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons set out in the opinion of Vice-Chancellor Pitney, delivered in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

2 Buch.Freund v. Freund.

MARY FREUND, respondent,

v.

MICHAEL FREUND, appellant.

[Argued March 11th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Emery, whose opinion is reported in 71 *N. J. Eq.* (1 Buch.) 524.

Mr. Thomas Anderson, for the appellant.

Mr. Moses J. DeWitt, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons set forth in the opinion delivered by Vice-Chancellor Emery in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

Johnson v. Hardman Rubber Co.

72 Eq.

In the matter of the estate of FREDERICK W. FLAACKE, deceased.

[Argued March 21st, 1907. Decided June 17th, 1907.]

On appeal from a decree of the prerogative court on accounting of executor, advised by the vice-ordinary, whose opinion is reported in 64 Atl. Rep. 1020.

Mr. Robert H. McCarter, attorney-general, for the appellant.

Mr. Charles H. Hartshorne, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons set out in the opinion filed by the vice-ordinary in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

CYRIL JOHNSON, respondent,

v.

HARDMAN RUBBER COMPANY, appellant.

[Argued March 21st, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery advised by Vice-Chancellor Stevens.

2 Buch.Helmuth v. Helmuth.

Messrs. Coult & Smith, for the appellant.

Mr. Chauncey G. Parker, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons set out in the opinion of Vice-Chancellor Stevens, delivered in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

HENRY HELMUTH, appellant,

v.

LOUISE HELMUTH, respondent.

[Submitted March 26th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Bergen.

Messrs. Weller & Lichtenstein, for the appellant.

Mr. Harry W. Lange, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons set forth in the opinion delivered by Vice-Chancellor Bergen in the court below.

Seligman v. Victor Talking Machine Co.72 Eq.

For affirmance—THE CHIEF-JUSTICE, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, GREEN, GRAY, DILL—12.

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ISAAC SELIGMAN, respondent,

v.

VICTOR TALKING MACHINE COMPANY, appellant.

[Argued March 26th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Garrison, whose opinion is reported in 71 *N. J. Eq.* (1 *Buch.*) 697.

Mr. Norman Grey and Mr. Horace Pettit, for the appellant.

Messrs. French & Richards, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons stated in the opinion delivered by Vice-Chancellor Garrison in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—13.

For reversal—None.

2 Buch.Roche v. Hoyt.

CHARLES W. L. ROCHE et al., respondents,

v.

GEORGE HOYT et al., appellants.

[Submitted March 26th, 1907. Decided November 18th, 1907.]

On appeal from a decree of the court of chancery, made by the chancellor, whose opinion is reported in 71 N. J. Eq. (1 Buch.) 323.

Mr. William A. Lord, for the appellants.

Messrs. E. C. & A. W. Harris, for the respondents.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated in the opinion filed by the chancellor in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—13.

For reversal—None.

Schippers v. Kempfes.

72 Eq.

WILHELMINA SCHIPPERS, executrix, respondent,

v.

RHEINHOLD H. KEMPES, appellant.

[Submitted March 26th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Stevenson, whose opinion is reported in *67 Atl. Rep. 1042*.

Mr. Charles B. Dunn and *Mr. Michael Dunn*, for the appellant.

Mr. Robert E. Van Hovenberg, for the respondent.

PER CURIAM.

The decree appealed from is affirmed, for the reasons stated by Vice-Chancellor Stevenson in the opinion delivered by him in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

2 Buch.Feigenspan v. Nizolek.

CHRISTIAN FEIGENSPAN, respondent,

v.

JOSEPH NIZOLEK, appellant.

[Argued March 28th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Pitney, whose opinion is reported in 71 N. J. Eq. (1 Buch.) 382.

Mr. James C. Connolly, for the appellant.

Mr. Herbert Boggs, for the respondent.

PER CURIAM.

The facts in this case, and the legal questions which it presents, are fully set out in the opinion of the learned vice-chancellor, who advised the decree appealed from. The object of the appeal is to enforce a written contract by enjoining the breach of a negative covenant contained therein. It is contended on behalf of the appellant that the court of chancery has no jurisdiction to enforce by injunction a negative covenant of the character contained in the contract between these parties. In the case of *Mausert v. Feigenspan*, 68 N. J. Eq. (2 Robb.) 671, the present respondent filed a bill to restrain the breach of a negative covenant similar to that contained in the contract in the present case. The court of chancery asserted its jurisdiction by decreeing the injunction, and its action was affirmed on appeal by this court. The question of jurisdiction is, therefore, *stare decisis*. We concur in the conclusion reached by the learned vice-chancellor upon the facts submitted.

The decree appealed from will be affirmed.

Brockhurst v. Cox.72 Eq.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

HARRY B. BROCKHURST, complainant,

v.

JOHN H. COX, defendant.

[Argued March 28th, 1907. Decided June 17th, 1907.]

On appeal taken by Elizabeth A. Brockhurst from a decree of the court of chancery, advised by Vice-Chancellor Garrison, whose opinion is reported in 71 N. J. Eq. (1 Buch.) 703.

Mr. Adolph A. Engelke, for the appellant.

Mr. Merritt Lane, for the respondent.

PER CURIAM.

The decree appealed from will be affirmed, for the reasons stated in the opinion delivered by Vice-Chancellor Garrison in the court below.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDBURGH, VROOM, GREEN, GRAY, DILL—14.

For reversal—None.

2 Buch.Cowdrey v. Cowdrey.

KATHERINE M. COWDREY, appellant and respondent,

v.

ALBERT E. COWDREY et al., appellants and respondents.

[Argued March 29th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Pitney, whose opinion is reported in 71 N. J. Eq. (1 Buch.) 353.

Mr. Edwin B. Goodell, for Katherine M. Cowdrey.

Messrs. Woodruff & Stevens, for Albert E. Cowdrey.

PER CURIAM.

This decree adjudges that the complainant, Katherine M. Cowdrey, is entitled to an estate in fee-simple in certain real estate, the legal title to which was in her husband during his life.

It was further decreed that the complainant was so entitled upon the condition that she execute a release to the heirs of her husband and their assigns of her right of dower in her former husband's remaining real estate.

On the main question in the cause, namely, whether the paper executed by the husband on the day of November 14th, 1904, established an equitable title in his wife, we concur in the conclusion of the learned vice-chancellor that it did.

We also concur in his conclusion that the complainant was a competent witness to prove conversations and transactions with her husband.

We are, however, unable to see how the condition imposed upon the wife, that she shall release her right of dower in the remainder of her husband's real estate, can be supported. It may be admitted that in view of the relative value of the prop-

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erty settled upon his wife, and the remaining property of the husband, it would have been an act of wisdom on the part of the husband to have coupled such a condition with the grant. But he did not do so.

The gift of a husband to his wife of land does not, *ipso facto*, bar her dower in the husband's remaining real estate. So any provision for an equitable jointure, which operates to put the widow upon her election, must be either expressly in lieu of dower, or the same instrument must make a disposition of some part of the estate which is clearly inconsistent with the existence of dower therein, so that, in claiming dower, the widow would defeat, interrupt or disappoint some provision of the instrument. *5 Am. & Eng. Encycl. L. (1st ed.) 916.*

There is no evidence that there was anything said by the husband respecting the matter of dower, even if such testimony was admissible, which it was not. *Stratton v. Best, 1 Ves. Jr. 285.*

So we are constrained to the conclusion that the decree must be reversed for the purpose of modification, by removing from it the conditions respecting the release of dower.

There were cross appeals. The complainant succeeds in her appeal, and the defendants fail in their appeal.

For affirmance—None.

For reversal—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VROOM, GREEN, GRAY, DILL—13.

2 Buch.Haley v. Goodheart.

JEREMIAH L. HALEY, appellant,

v.

FANNIE GOODHEART et al., respondents.

[Argued March 14th, 1901. Decided June 17th, 1901.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Stevens, whose opinion is reported in *58 N. J. Eq. (13 Dick.) 368*.

Mr. Richard V. Lindabury, for the appellant.

Mr. Charles L. Corbin, for the respondents.

Affirmed June 17th, 1901.

For affirmance—THE CHIEF-JUSTICE, VAN SYCKEL, GARRISON, GUMMERE, GARRETSON, HENDRICKSON, BOGERT, ADAMS, VREDENBURGH, VOORHEES, VROOM—11.

For reversal—None.

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German Pioneer Verein v. Meyers.

72 Eq.

THE GERMAN PIONEER VEREIN, respondent,

v.

GEORGE A. MEYERS, executor, appellant.

[Submitted March 25th, 1907. Decided June 17th, 1907.]

On appeal from a decree of the court of chancery, advised by Vice-Chancellor Pitney, whose opinion is reported in 70 N. J. Eq. (4 Robb.) 192.

Mr. Francis Scott, for the appellant.

Messrs. Hudspeth & Carey, for the respondent.

PER CURIAM.

The decree in this case is affirmed, for the reasons contained in the opinion delivered in the court of chancery by Vice-Chancellor Pitney.

In respect to one matter of fact there is an error in the vice-chancellor's opinion which, while not of controlling importance upon this appeal, had best be corrected. The vice-chancellor states that the complainant was organized for the purpose of taking over the legacy provided by the will of Raymond Rath, deceased, with which it established the home that bears the name of its founder. The corrected testimony of the only witness who spoke to this subject makes it clear that the complainant was organized as a verein in 1898 before the death of Rath and without any reference to the said provision of his will. The complainant took the Rath fund as a trustee for the purposes named in the will of the settlor, viz., a home for aged Germans. Inasmuch as it is the name and home feature of this trust and not the other verein purposes of the complainant that entitle it to the legacy accorded to it by the decree of the court of chancery, such

2 Buch.**German Pioneer Verein v. Meyers.**

legacy comes into the hands of the complainant to be used exclusively by it for the purposes of such home and not for any of its other more general objects.

The decree is affirmed.

For affirmance—THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDBURGH, VROOM, GREEN, GRAY, DILL—14.

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2. — The act of March 14th, 1851, section 10 (*P. L. 1851 p. 257*), exempted the lands of cemetery associations formed thereunder from sale under execution. The act of April 8th, 1875 (*Rev. p. 102; Gen. Stat. p. 350*), repealed the act of 1851. The act of March 14th, 1879 (*P. L. 1879 p. 318; Gen. Stat. p. 360 § 56*), amended section 10 of the repealed act of 1851.—*Held*, that the act of 1879 does not repeal the act of 1875. *Id.*.....

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3. — The act of April 8th, 1875, section 8 (*Rev. p. 102; Gen. Stat. p. 350 § 8*), exempting from sale under execution the cemetery lands and property of cemetery associations, applies only to land of the association actually brought into use as a cemetery, though the act of May 9th, 1889 (*P. L. 1889 p. 418; Gen. Stat. p. 356 § 40*), authorizes the holding of one hundred and twenty-five acres for cemetery purposes. *Id.*.....

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4. — The act of March 21st, 1881 (*P. L. 1881 p. 158; Gen. Stat. p. 353 § 18*), provides that the rents, &c., of land held by a cemetery association may be taken and sequestered and applied to the payment of judgments against the association, and the court of chancery may appoint a receiver to take and apply the rents, &c., for that purpose.—*Held*, that where the lands of a cemetery association not used as a cemetery are sold to satisfy a mortgage on the entire tract owned by the association, and the proceeds are insufficient to satisfy the amount due, a receiver may be appointed to take possession of the cemetery tract reserved from sale and sequester the income for application to the amount remaining due under the decree of foreclosure. *Id.*.....

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CERTIFICATE OF STOCK—*See* CORPORATIONS, 1.

CHARTER PARTY—1. A clause in a charter party that the vessel was a guarantee insurance at lowest regular rates should not be construed to mean that the vessel itself or the owners should provide insurance for which they were to be paid the regular

CHARTER PARTY—*Continued.*

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- rates, but that the owners guaranteed that insurance on the cargo by the owners thereof was procurable at the lowest regular rates. *LEONARD v. BOSCH*..... 131
2. — In an action by the owners of a cargo to recover a deposit made by the owners of the vessel in lieu of insurance, evidence *held* to require a finding that the depositors and the agent of the owner of the cargo both intended that the deposit should be for the owners of the cargo, and was deposited pursuant to the terms of the charter party in execution of the clause that the charterers were not obliged to begin loading before the deposit in guarantee of insurance had been made. *Id.*..... 131
3. — Plaintiffs, being unable to procure insurance on a cargo of scrap iron to be shipped on defendants' vessel, executed a charter party through B., as their agent, providing that the vessel should guarantee insurance at lowest regular rates; that the owners should deposit \$23,000 in lieu of insurance, and that the charterers were not obliged to begin loading until the deposit was made. B., at the time, was traffic manager of a bridge company, which had a contract to purchase the scrap iron from plaintiffs on delivery at the port of discharge, and certain of the correspondence relating to the deposit which passed between defendants and B., through oversight or mistake, was addressed to him as traffic manager of the bridge company, defendants supposing that the latter was the owner of the cargo.—*Held*, that such mistake was not in the making, but in the execution, of the contract, and that the deposit was in fact made for the benefit of plaintiffs, who were the owners of the cargo. *Id.*..... 131
4. — A contract of affreightment commences from the loading of the vessel, from which time each party is bound to the other for the full performance of the contract. *Id.*..... 131
5. — Where a charter party required the owners of the vessel to make a deposit in lieu of insurance, and declared that the charterers were to begin loading on the deposit being made, the charterers, on notice of the deposit, and on loading the vessel, took the risk thereof for the entire voyage, and were entitled to the benefit of the security for such period, or until insurance for their benefit was effected by the owners of the vessel. *Id.*..... 131

CHATTEL MORTGAGES—1. A chattel mortgage may be made a lien on the outstanding book accounts due to a mortgagor and also upon such book accounts as shall thereafter become due to the mortgagor in the regular course of his business. *BUVINGER v. EVENING UNION PRINTING Co.*..... 321

2. — Plaintiff and B. purchased a livery stable in common, executing a chattel mortgage to the seller to secure their several notes for a part of the price, each being an endorser for the other. Plaintiff paid off his note, but while the other was out-

CHATTEL MORTGAGES—*Continued.*

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standing B. applied to S. for a loan, and on being asked if he was the individual owner of the property replied that he was, "as the interest of another party therein had been paid off," without mentioning the name of the person otherwise interested, and also stated that there was a chattel mortgage on the property held by the original vendor to secure \$500 which was subsequently paid with a part of the money borrowed from S.—*Held* sufficient to charge S. with notice of plaintiff's interest in the property.

LONGLEY v. SPERRY..... 537

3. — Plaintiff and B. having purchased a livery business, mortgaged the property to secure their several notes given for part of the price on which each was endorser for the other. Plaintiff paid his note, and thereafter B., having wrongfully obtained possession of the mortgage, borrowed more money from S., giving a chattel mortgage on the property with which he paid his note to a bank which had discounted it, and also executing an assignment of the vendor's original mortgage to S. B. then applied to plaintiff, offering to purchase his interest, producing to him the original chattel mortgage with the seals torn off, and the note stamped "paid" by the bank, whereupon plaintiff sold his interest to B., taking a chattel mortgage for a part of the price without knowledge of the assignment.—*Held*, that the assignment of the mortgage without the transfer of the unpaid note secured thereby conferred no rights on the assignee as against plaintiff. *Id.*.... 537
4. — The fact that the note and mortgage were presented by B. to plaintiff, the one with the seal torn off, and the other marked "paid" two months before its maturity, was insufficient to put plaintiff on inquiry, or excite suspicion that the note and mortgage had been stolen. *Id.*..... 537
5. — *P. L. 1902 p. 489 § 8*, providing that chattel mortgages duly recorded shall be valid against creditors of mortgagors and against subsequent purchasers, and mortgagees from the time of recording until the mortgages are canceled of record, was ineffective to validate, as against a subsequent mortgagee in good faith, a prior mortgage which had been in fact paid but which was not canceled of record. *Id.*..... 537
6. — *P. L. 1902 p. 488 § 6*, relating to chattel mortgages, provides that no chattel mortgage shall be recorded until its execution shall be first acknowledged or proved and certified in the manner required by the act respecting conveyances, which (*P. L. 1898 p. 678 § 22*) provides that the officer having first made known the contents of the instrument to the party making the acknowledgment and being satisfied that such party is the grantor, &c., shall make a certificate on, under or annexed to the deed or instrument.—*Held*, that where the certificate of acknowledgment to certain chattel mortgage assignments did not

CHATTEL MORTGAGES—*Continued.*

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state that the contents of the assignments had been made known to the party acknowledging the execution thereof, the acknowledgments were fatally defective. *Id.*..... 537

7. — The record of chattel mortgage assignments not properly acknowledged, and, therefore, not entitled to record, did not operate as constructive notice to a subsequent mortgagee. *Id.*... 537

8. — The rule that a chattel mortgage may be kept alive notwithstanding payment in order to secure another creditor of the mortgagor as against subsequent encumbrances or purchasers is inapplicable where the attempt to keep the mortgage alive has been made by only one of the mortgagors having only a third interest in the mortgaged chattels for the purpose of defrauding his co-owner. *Id.*..... 537

9. — Where an assignee of a mortgage permitted the note which it was given to secure to come into the hands of the mortgagor with evidence on its face that it had been paid and did not secure possession of the mortgage itself, which the mortgagor thereafter used to induce the belief on the part of his partner and subsequent mortgagee that the note had been paid, such assignee was not entitled to claim that the mortgage should be kept alive to secure money which he loaned to take up the note secured by the mortgage. *Id.*..... 537

10. — Where one of the members of a firm engaged in operating a livery stable mortgaged the entire assets of the firm to raise money which he converted to his own use, such mortgage was only effective to create a lien on the mortgaging partner's interest in the firm after an accounting. *Id.*..... 537

11. — Where a chattel mortgage was properly executed, acknowledged and recorded, it operated as notice to a subsequent mortgagee under the express provisions of *P. L. 1898 p. 690 § 53*. *Id.*, 537

CONTEMPT—1. A decree of the court of chancery adjudging one guilty of contempt of that court in attempting to improperly influence the due administration of justice therein, rendered in proceedings instituted solely for the purpose of vindicating the dignity and authority of the court, is not reviewable except for want of jurisdiction in the court. *SEASTREAM v. NEW JERSEY EXHIBITION Co.*..... 377

2. — A proceeding to punish for contempt was begun by an order directing the accused persons to appear in court at a time specified and show cause why they should not be adjudged guilty. The order was based on affidavits setting forth the acts charged as contempt, consisting of an attempt to improperly influence the administration of justice in such court. The order and affidavits were served on them. On the return day proofs were taken on

CONTEMPT—Continued.

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the charges and in defence thereof.—*Held*, that as the persons were informed of the charges, and were afforded an opportunity to meet them, the court had jurisdiction of the proceeding. *Id.*... 377

3. — Where one charged with contempt of court voluntarily offered himself as a witness on the hearing, and was examined by his counsel, and submitted without objection to cross-examination by counsel appointed by the court to prosecute the charge against him, he could not urge that the court subjected him to examination and cross-examination without authority. *Id.*..... 377
4. — A vice-chancellor has authority as a master of the court of chancery to take testimony of witnesses produced before him in a proceeding to punish one for contempt of the court of chancery, and submit the same to the chancellor for adjudication. *Id.*..... 377

CONTRACTS—Evidence *held* insufficient to establish a contract by which a wife agreed to make an irrevocable will in her husband's favor. *LIPP v. FIELDER*..... 439
See **BOYCOTT; CHARTER PARTY; CORPORATIONS, 26-28; GENERAL PROPRIETORS OF EASTERN DIVISION OF NEW JERSEY, 14.**

CONVEYANCES—*See* **VENDOR AND PURCHASER.**

CORPORATIONS—1. After the filing of a consolidation contract between certain corporations, the business previously transferred by the constituent companies was carried on by the merged corporation as an entirety, and a large amount of the property received by the merged corporation had been sold, exchanged, or converted into other forms, and the receipts therefor had been so commingled that it became impossible to identify the same or to separate the business of the constituent corporations. Complainant, a stockholder in one of such corporations, made no objection to the merger until nearly six months after the merger agreement, during which time the consolidated corporations' securities had been put on the market and were largely dealt in. It also appeared that complainant's assignor, who was the administrator of the record holder of the stock, had received notice of the meeting at which the merger agreement was entered into, and complainant when he acquired the stock had actual notice thereof, and bought the stock for the purpose of suing to set aside the consolidation.—*Held*, that complainant was not entitled to a decree vacating such merger agreement and requiring the officers of his corporation to resume possession of its assets and continue to transact its business. *BELING v. AMERICAN TOBACCO Co.*..... 32

2. — Where complainant acquired certain corporate stock as administrator of his father, who died in 1904, it was complainant's duty either to have the stock transferred on the books of the company or to give distinct notice that subsequent notices of meetings sent to him as a stockholder should be sent

CORPORATIONS—*Continued.*

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to a certain address, in order to charge the corporation with neglect in continuing to send notices to the address of his father as the registered holder of the stock. *DANA v. AMERICAN TOBACCO Co.*..... 44

3. — Complainant acquired certain stock in defendant company as administrator of his father's estate, but took no steps to have the stock transferred until after his return from Europe, when he learned that proceedings were in progress for the consolidation of the corporation with certain other corporations. Complainant waited some eight weeks before he employed local counsel to attack the merger, during which time the new corporation's stockholders' "rights certificates" and corporate bonds had been issued.—*Held*, that the complainant was not entitled to the relief prayed for, which consisted in the actual separation of the original assets of the corporation whose stock was held by complainant, and the resuscitation of the corporation and its being compelled by a decree of this court to proceed to conduct the business provided for in its articles of association. *Id.*..... 44

4. — A corporation, authorized to issue stock of the par value of \$250 in payment of property or corporate stock, must, to make lawful the issue of stock in consideration of acquiring the stock of another corporation, and to supply a sufficient consideration for a promise to pay an additional sum for such stock, make a *bona fide* appraisal of the actual cash value of the stock acquired at a sum not less than the par value of the stock issued, together with the additional sum agreed to be paid. *STRICKLAND v. NATIONAL SALT Co.*..... 170

5. — An intentional disregard of the statutory rule, involving an intentional overvaluation of property acquired by a corporation, is a form of fraud prohibited by the statute, and the issuing of stock without making any appraisal of the value of the thing purchased thereby is unlawful. *Id.*..... 170

6. — A domestic corporation was authorized to issue stock of the par value of \$250 in payment of property of that value, including shares of corporate stock. The corporation agreed to pay \$250 in its own stock for each share of a foreign corporation, and agreed to pay, in addition, \$106.25 in ten semi-annual installments.—*Held*, that if each share of stock of the foreign corporation was worth \$356.25, the semi-annual installments would be ordinary debts, the equivalent of which had gone into the treasury of the domestic corporation, and would not be dividends. *Id.*..... 170

7. — A corporation, by pledging its own stock as collateral to another corporation, cannot empower the pledgee corporation to exercise a power or incident of ownership which the real owner does not possess. *THOMAS v. INTERNATIONAL SILVER Co.* 224

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8. — Evidence examined, and *held* to show a pledging of stock, not made in good faith for the purpose of affording additional security for loans, but for the purpose of placing the stock in the hands of those friendly to the existing management, in order that it might be voted on to retain them in power, and thus avoid the letter and spirit of the prohibition contained in the thirty-eighth section of the General Corporation act of this state. *P. L. 1896 p. 277. Id.*..... 224
9. — *P. L. 1896 p. 300* provides that the receiver of a corporation shall have power to send for persons, and to examine them on oath respecting the corporation's affairs, and that if any person shall refuse to be sworn, the court of chancery may, on report of the receiver, commit such person to prison.—*Held*, that where service of a summons was made by the receiver on a person without the state, the courts of the state had no authority to make an order adjudging such person in contempt for failing to appear. *FIDELITY AND CASUALTY Co. v. MACAFEE Co.*..... 280
10. — The general manager of a corporation, who was also a stockholder and a member of the board of directors, held to be entitled to preferment under *P. L. 1896 p. 303 § 83* for two months' wages next preceding the institution of proceedings of insolvency. *BUVINGER v. EVENING, &C., Co.*..... 321
11. — The prohibition of section 30 of the General Corporation act (*P. L. 1896 p. 286*) that "no corporation shall make dividends except from the surplus or net profits arising from its business, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of its capital stock, or reduce its capital stock, except according to this act," is to be read in connection with the provisions of sections 27 and 29 respecting a decrease of capital stock, and deals with the payment of a dividend out of capital as amounting in effect to a reduction of capital stock. *SIEGMAN v. ELECTRIC VEHICLE Co.*..... 403
12. — While it is a function of the board of directors of a corporation to determine whether net earnings or surplus exist applicable to the payment of dividends, they cannot, by an erroneous determination of this point, confer either upon themselves or upon the corporation the power to make dividends out of capital. *Id.*, 403
13. — The approval of a majority of the stockholders does not validate the declaration of dividends out of capital. *Id.*..... 403
14. — Neither the directors nor a majority of stockholders can waive the right of the company under section 30 of the General Corporation act (*P. L. 1896 p. 286*), to recover from the directors the amount of dividends made out of capital. *Id.*..... 403

CORPORATIONS—Continued.

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15. — The rule that courts will not ordinarily interfere with the internal management of corporations has no application to transactions that are *ultra vires* the company or prohibited by positive law. *Id.*..... 403
16. — A corporation, empowered by its charter to do any act in connection with its business, and to issue bonds secured by mortgage, and to sell the same to raise money with which to erect machinery, &c., has authority to borrow money and execute a mortgage to secure the same, the clause having reference to the issuing of bonds not preventing the corporation from borrowing money and securing it by mortgage. *BROWN v. CITIZENS ICE, &c., Co.*..... 437
See SERVICE OF PROCESS.
17. — Contracts with a corporation for the services of a director, to be performed in the management of the ordinary business of a corporation, are valid, subject to judicial review, so far as the amount of compensation is concerned, either on behalf of stockholders of a going corporation or the creditors of an insolvent one. *MITCHELL v. UNITED BOX BOARD AND PAPER Co.*..... 581
18. — Advances of money to a corporation by a director thereof may be secured, and a sale of property to the director to pay the debt is valid, so far as the transfer is concerned, subject to review on the question of the fairness of the price. *Id.*..... 581
19. — In a suit by the receiver of a corporation to set aside a mortgage given by the corporation in part payment for land sold to it by the wife of the president, it appeared that the wife purchased the land for \$450 and sold it to the corporation for \$3,000; that the president was the moving spirit in the organization of the corporation, and that but three of the five directors were present at a meeting at which the resolution for the purchase was passed, and that at such meeting the wife was elected secretary; that no notice of the first meeting of the directors was given and no waiver of notice executed. It was shown that when an application was made for the appointment of a receiver of the corporation, the wife pledged the mortgage to raise money to contest the receivership, and that thereafter she sold it and applied part of the proceeds to the husband's uses.—*Held*, that the facts warranted an abatement of the mortgage, except as to the amount which the wife had paid for the land. *VOORHEES v. NIXON* 791
20. — In a suit by the receiver of a corporation to set aside a mortgage given by it to the wife of an officer, it appearing that practically all of the stockholders had been ignorant of the facts on which the right to relief was based, and that they had been deceived by the officer in question, no laches could be imputed. *Id.* 791

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21. — The assignee of a mortgage securing a bond takes it subject to all defences to the bond, whether with or without notice, as the mortgage is a mere incident of the debt. *Id.*..... 791
22. — Where a corporation executed a mortgage to the wife of the president in part payment for land sold to the corporation by her, and thereafter the corporation was restrained from transferring any of its property rights, which was known to one who purchased the mortgage, and without any action of the board of directors authorizing it, the president and his wife, as secretary of the corporation, executed in the name of the corporation, at the instance of the purchaser, a declaration against offsets, such instrument was no bar to the assertion by the corporation's receiver of defences against the mortgage, on the ground that the execution thereof arose from a violation of a fiduciary relation. *Id.* 791
23. — A director of a corporation may purchase the corporation property sold under an execution on a judgment obtained by him against the corporation, and the sale will not be set aside because of his trust relationship, unless some undue advantage has been secured by reason of that position. *MARR v. MARR*..... 798
24. — In an action by a stockholder of a corporation to set aside a sale of the corporate property under an execution on a judgment obtained by a director against the corporation to the director, the fact that notice of the sale, other than the statutory notice, was not given to all the stockholders was insufficient to show that the director had taken any undue advantage. *Id.*..... 798
25. — The General Corporation act, sections 64 and 86 (*P. L. 1896 pp. 298, 304*), making preferments in contemplation of insolvency void, does not authorize equity at the suit of the receiver of a corporation to set aside a judgment against it in favor of the wife of its president, resulting from his activity in her behalf and the purposeless inaction of the remaining directors. *SHINN v. KUMMERLE*..... 828
26. — Where corporations are merged into a new corporation, and mortgage bondholders of one of the constituent companies exchange their bonds for mortgage bonds of the consolidated company by depositing them with a trustee, who retains them uncanceled, the question whether they are in equity to be held to be satisfied depends upon the intent of the parties and the facts of the case. *BURLINGTON CITY L. & T. Co. v. PRINCETON LIGHTING Co.*..... 891
27. — Where an agreement for the merger of corporations provides for the issue of mortgage bonds to be exchanged for similar bonds of the constituent companies, the holders of the latter

CORPORATIONS—*Continued.*

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bonds who do not assent to the merger agreement cannot complain if the parties thereto vary the terms upon which the bonds are exchanged. *Id.*..... 891

28. — Where an agreement for the merger of corporations provides for the exchange of the whole of an outstanding issue of bonds for new bonds of the consolidated company by depositing them with a trustee, and the deposited bonds are held by the trustee uncanceled, and the agreement is not consummated owing to the failure of some of the old bondholders to assent, the question whether the bonds actually deposited are to be held as additional security for the benefit of those depositing them and taking new bonds in exchange, or for the benefit of all holders of the new bonds, depends upon the intention of the parties and the facts of the case. *Id.*..... 891
See INSOLVENT CORPORATIONS.

COSTS—1. An answer by way of cross-bill, filed under chancery rule 206, is a pleading in the original cause, and costs taxed thereon are costs for which the solicitor filing a bill for a non-resident complainant is responsible, if the complainant has not given the security required by the statute. *REED v. BENZINE-ATED SOAP Co.*..... 622

2. — The power to hold a solicitor for costs, when the complainant is a non-resident, is purely statutory, and will only be enforced where the complainant is required to give security, and if the right to such security is waived, as to the complainant, by the defendant, the waiver inures to the benefit of the solicitor. *Id.* 622

3. — If the defendant proceeds with the cause on his own behalf after obtaining an order requiring the complainant to give security, it amounts to a waiver of the right to security. *Id.*.... 622
See COUNSEL FEES.

COUNSEL FEES—A person who files a claim with a receiver of an insolvent corporation and sustains his claim before the receiver and before this court on appeal, is not a complainant within the meaning of the ninety-first section of the Chancery act (*P. L. 1903 p. 540*), and is not entitled to the allowance of a counsel fee to be included as taxable costs. *PORCH v. AGNEW Co.*..... 319

COVENANTS—1. On a bill by grantors against grantees in a deed to enforce a restriction contained in the deed against the construction of a flat or tenement-house, evidence considered, and held to show no waiver of the restriction. *LIGNOT v. JAEKLE*... 233

2. — Any building consisting of more than one story, in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes, is a "flat," within

COVENANTS—*Continued.*

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- the meaning of a restriction in a deed that the grantee shall not permit to be erected on the premises any building which shall be used or occupied as a flat. *Id.*..... 233
3. — If what is known as a "flat" becomes an "apartment-house" when higher rental is charged, the payment of a rental of from \$35 to \$40 per month does not turn what is otherwise a "flat" into an "apartment," so as to take it out of a building restriction binding the grantee not to erect a flat on the premises. *Id.* 233
4. — Where a grantor, retaining a portion of the land, enters into a written understanding with the grantee restricting the enjoyment in order to benefit the portion retained, and the restriction is reasonable, it will be enforced in equity against the grantee. *Id.*..... 233
5. — If a grantee claims that his deliberate disregard of a building restriction written in a grant does not damage the grantor, he must make his position clear beyond the possibility of doubt. *Id.* 233
6. — In an action by grantors against grantees to enforce a building restriction contained in a deed, evidence *held* to show that complainants were not guilty of laches. *Id.*..... 233
7. — All deeds of lots sold by complainant in a settlement established by it contained a covenant that no liquor should be sold on the granted premises except on consent executed with the formalities of a deed.—*Held*, that though liquor has been sold on the tract for a number of years in violation of law and the covenant, and a wholesale liquor license has been issued for three years authorizing sale in a building on the tract, yet, complainant having at no time given even tacit sanction to violation of the covenant, but all sales having been against its honest efforts to prevent such violation, and the delay in filing bill to enforce the covenant having been due to hope that the sale could be otherwise stopped, there has been no waiver of right to enforce the covenant. *WOODBINE L. AND I. CO. v. RIENER.*..... 787
8. — Where an owner of land lays it out into streets and lots, and adopts a restrictive covenant as to the building line, and inserts the covenant in all deeds as an exaction from all purchasers for the benefit of each, the equitable right to enforce the covenant enures to each purchaser, irrespective of when he purchased. *BARTON v. SLIFER.*..... 812
9. — Complainants showed a right to enforce a restrictive building covenant where their bill averred the purchase of the original tract of land by an association, its subdivision into lots, the adoption of a general building scheme to secure an unobstructed

COVENANTS—*Continued.*

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view, &c., to the lot purchasers, the adoption of the restrictive covenant, and its insertion in all deeds made by the association.

Id. 812

10. — Where the deeds to all lots in a town contained a uniform restrictive building covenant, complainants' right to enforce it against a neighboring owner was not lost because there had been several violations of the covenant, where the violations in no substantial way affected their property, and did not show any intention to abandon the general plan in the district wherein the parties' property was located. *Id.* 812

11. — Complainants were not estopped by laches to enforce a restrictive building covenant where, when defendant attempted to violate it, they promptly notified the foreman of the work that their rights were being violated, and where a bill was thereafter filed as quickly as it could be procured. *Id.* 812

12. — Where grantors of a shore front at a summer resort reserved the right to build a pier, covenanting not to permit the sale of commodities thereon, and to charge only an entrance fee, their covenant is not broken by charging for the use of roller skates at a rink on the pier, where all who pay the entrance fee may go to every part of the pier, including the rink. ATLANTIC CITY v. ASSOCIATED REALTIES CORPORATION 634

13. — An owner who divides his lands into lots and streets as shown by a map filed by him with the county clerk, and who sells lots as shown thereon, does not, in the absence of a neighborhood scheme calling for the erection of but one building on a single lot, impliedly covenants not to sell the lands except in the parcels delineated on the map, but he may subdivide the lots into smaller parcels and sell them in such parcels or devote any part of the same to public uses, as streets, parks, &c. HEROLD v. COLUMBIA INVESTMENT AND REAL ESTATE CO. 857

14. — An owner who divides his lands into lots and streets as shown by a map filed by him and who sells lots as shown thereon impliedly covenants with his grantees that they shall have a right of passage over such streets as an appurtenant to the premises granted to them; and such grantees may enjoin a change in the location of or a narrowing of the width of the streets, without first showing that the same will result in depreciation of the value of the lot purchased. *Id.* 857

CREDITOR'S BILL—Upon a creditor's bill filed to have a judgment against a husband declared a charge against the wife's house and lands, on the ground that the property had been conveyed to the wife by the husband through a third party, in fraud of his creditors, the court refused to declare the deed fraudulent as against complainant, but it appearing that the husband, since the transfer, had paid the interest on a mortgage

CREDITOR'S BILL—*Continued.*

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upon the premises, and also taxes and assessments thereon during a period of thirteen years to an aggregate amount but little less than the amount of the judgment, made a decree charging the land with the payment of the judgment to the extent of those payments.—*Held*, on appeal, that it appearing from the evidence that at least part of the money so paid by the husband was advanced to him by his son for the purpose of making those payments in relief of his mother's home, and it further appearing that during the whole period the husband, whose duty it was to provide a home for his family, had used and occupied his wife's house and lands for that purpose, and it not being made to appear that the amount of such payments were in excess of the amount necessary for the reasonable support of the wife and family, such payments were not fraudulent as against creditors, and that the bill should have been dismissed.—*Held further*, that it appearing that the creditor had delayed the filing of his bill for thirteen years after the recovery of his judgment, and that the situation of the wife had been entirely changed thereby from what it otherwise would have been, to her prejudice, the bill should have been dismissed on the ground of laches also. *FARE v. HAUENSTEIN*..... 876

D.

- DAMAGES**—1. The measure of equitable damages which a *cestui que trust* is entitled to recover for a breach of trust is, at the option of the *cestui que trust*, the amount actually lost by the breach, or the amount which the trustee has gained thereby. *PROPRIETORS, &C., N. J. v. FORCE*..... 56
2. — Where a contractor fails to fulfill his contract, it is the duty of the other party to make reasonable exertions to mitigate his loss. *RAMSEY v. PERTH AMBOY, &C., Co.*..... 165
3. — Evidence of a claim for damages for breach of contract filed with a receiver considered, and *held* not to show that the claimant could have done anything to mitigate the loss. *Id.*.... 165
4. — The burden of proving that damages for breach of contract could have been mitigated rests on the party guilty of the breach. *Id.*..... 165
5. — The provision in a shipbuilding contract giving the party contracting for the ships power to complete the work in the event of failure by the other party is not compulsory. *Id.*..... 165
- DEATH**—1. Presumption of death, after an unexplained absence of seven years, does not arise where the supposed decedent has been heard from and there is reliable information that he was alive within four years. *SPIILTOIR v. SPIILTOIR*..... 50

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2. — Upon proof raising a presumption of death under the provisions of the act entitled "An act declaring when the death of persons absenting themselves shall be presumed," passed March 7th, 1797, the will of a person so presumed to be dead may be admitted to probate. *STERNKOPF'S CASE*..... 356

DEBTOR AND CREDITOR—See ATTORNEY AND CLIENT; INSOLVENT ESTATES; STOCKHOLDERS, 10.

- DECREE**—1. Where a surviving partner wrongfully misappropriated funds which he held in trust for the estate of his deceased partner, the latter's administrator, in a proceeding in equity to compel the enforcement of a decree for the payment of the money, was entitled to process against defendant's body, which would be executed in the absence of proof that defendant was unable to obey the order. *HAGGERTY v. BADKIN*..... 473

2. — A final decree granting an injunction will not be modified by striking out words deliberately placed in the decree by the court, for the reasons given in deciding the case, which decree was affirmed on appeal, for the reasons given by the court below, since the application for the modification is substantially an application to the trial court for a rehearing after affirmance on appeal. *EUREKA FIRE HOSE CO. v. EUREKA RUBBER CO.*..... 555

3. — Provisions in a final decree authorizing either party to appeal to the court for further directions necessary to effectuate the decree or protect the rights of either party do not authorize the striking out of material words in such decree deliberately placed there by the court after due consideration. *Id.*..... 555

4. — A decree granting an injunction will not be construed on application for such construction, nor until the question comes regularly before the court, in proceedings requiring its construction and application to acts alleged to be done or omitted under it. *Id.*..... 555

5. — An enrolled decree may be opened on petition to permit the defendant to make a defence on the merits. *WHITE v. SMITH*.. 697

6. — Where a decree was taken against a party without a trial on the merits as to a particular proposition in the case, it is within the discretion of the chancellor to open the decree and permit a defence on the merits of such question. *Id.*..... 697

7. — Evidence held to require a finding that an alleged lost deed executed by a son to his mother was not for the benefit of petitioners, and that they were therefore not entitled to open an enrolled partition decree for the purpose of claiming title to a portion of the property under such deed. *Id.*..... 697

DECREE—*Continued.*

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8. — A petition to open a final decree for error apparent in the record must be brought within the time allowed for an appeal or writ of error, where the complainant has been under no disability during that period. *KELSEY v. DILKS*..... 834

DISTRIBUTION—1. A bill by one who is next of kin against an administrator and the sureties on his bond, specifically praying for an ascertainment of complainant's distributive share, justifies a decree for the payment of the amount, when ascertained, under the prayer for general relief, and the bill is not defective because of the absence of a specific prayer for payment. *VAN DYKE v. VAN DYKE*..... 300

2. — A bill by an heir as next of kin against the administrator to determine the amount of her distributive share, alleged fraud in the accounts filed in the orphans court, and sought, by specific interrogatories, to ascertain information as to certain securities which had come into defendant's hands, and asked that defendant set forth the several items of assets and disbursements.—*Held*, that the fact that the accounts had been settled in the orphans court, and that complainant participated in the settlement, does not exonerate defendant from answering the interrogatories and from setting forth the accounts. *Id.*..... 300

DIVORCE—1. Evidence in a suit for divorce considered, and *held* not to sustain the master's finding of willful, continued and obstinate desertion. *SMITH v. SMITH*..... 5

2. — A wife was shown to have frequently left her husband, but to have always returned to him upon his request. Her leaving him, which was claimed to be desertion, was proved, but he made no request for her return thereafter. A letter, claimed to have been received by him from her, might have excused him for not seeking her return, but the receipt of the letter was only proved by his uncorroborated evidence.—*Held*, that a report that her desertion was willful and obstinate was not supported by evidence. *Id.*..... 5

3. — *1 Gen. Stat. p. 1187* provides that anyone absenting or hiding himself for seven years shall be presumed to be dead "in any case wherein his or her death shall come in question," and provides for the property rights of the parties on the return of the supposed decedent. *P. L. 1898 p. 808 § 52* relieves from criminal punishment a wife who in good faith marries after the husband has absconded, but does not legitimize such second marriage.—*Held*, that *1 Gen. Stat. p. 1187* has no application to a proceeding for divorce against an absconding husband not heard from, and hence will not prevent the granting of a divorce. *SPILTOIR v. SPILTOIR*..... 50

4. — Where the only evidence of the desertion of petitioner's husband, which was alleged to have occurred in St. Louis, Mis-

DIVORCE—*Continued.*

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souri, in 1892, was that of petitioner herself, and the only other testimony in the case was given by persons residing in New Jersey, that the husband had not visited his wife since her return to her father's house in 1895, there was not sufficient corroboration as to the fact of desertion to entitle petitioner to a divorce. *SHARP v. SHARP*..... 231

5. — Where, in a suit for divorce for desertion, the original separation was not shown to have been a desertion, evidence proving its continuance was insufficient to entitle the wife to a divorce. *Id.*..... 231

6. — Where a husband, after removing to New Jersey from Russia, wrote to his wife in March, 1901, to get ready to come over, and she replied that she did not then want to come, and requested him to send her money, which he did, and continued to do, such fact was insufficient to establish the wife's desertion as of the date of her refusal. *MIZOROWSKY v. MIZOROWSKY*.... 246

7. — Where a petition for divorce for desertion was filed in February, 1904, and the only desertion proved was in June, 1902, and in September, 1903, it was insufficient, being less than two years prior to the commencement of the suit. *Id.*.... 246

8. — On a husband's petition for divorce, evidence *held* to establish adultery on the part of the wife with the party charged as co-respondent. *DUKE v. DUKE*..... 515

9. — In such case, where the party charged as co-respondent intervenes as provided under the Divorce act (*Rev. 1902; P. L. 1902 p. 506 § 14*), he is liable to the husband for the payment of his costs and counsel fees incurred in prosecuting the suit. *Id.*..... 515

10. — Evidence in a suit for divorce considered, and *held* sufficient to show a *bona fide* residence in the state by petitioner. *HEEB v. HEEB*..... 617

11. — Evidence in a suit for divorce *held* sufficient to show desertion by husband. *Id.*..... 617

12. — Where the domicile of matrimony is in a certain state, and the husband deserts the wife, the domicile of the wife continues in that state until she has acquired one elsewhere. *HIBBERT v. HIBBERT*..... 778

13. — The law will not presume the place of birth as a domicile, based upon the abandonment of the last domicile, without the intention of adopting a new one, unless the evidence clearly establishes the facts on which that presumption is based. *Id.*... 778

DIVORCE—Continued.**PAGE.**

14. — In an action for divorce, evidence *held* not to show an abandonment by the complainant of the domicile of matrimony. *Id.* 778

DOWER—See HUSBAND AND WIFE.

E.

- EASEMENTS**—1. A deed whereby, for a cash consideration named and the payment of damages to be ascertained by disinterested persons on oath, one grants the right to lay pipes for the transportation of petroleum, together with all the rights and privileges necessary to the enjoyment of the grant and the removal of the pipes, the pipes to be laid within ten feet of the line of the grantor's property, does not convey a mere easement in gross, nor a license which may be revoked at the will of the grantor, and it is not revoked by its assignment to a third person. **STANDARD OIL CO. v. BUCHI.** 493
2. — Under a grant of right to lay pipes in land to convey petroleum, the exercise of the right by the laying of a single pipe and later of a second pipe does not define the extent of the easement so as to prevent the laying of a third pipe. *Id.* 493
3. — Under a grant of right to lay pipes in land to convey petroleum, the mere lapse of time does not affect the right of the grantee to lay additional pipes. *Id.* 493
4. — Where a railroad purchased the fee of land for occupation by its tracks in the exercise of its public franchise of operating a railroad, one who had an easement of a right of way over such land, which easement was interfered with by the operation of the railroad, was entitled to compensation under the Eminent Domain act (*Revision, P. L. 1900 p. 79*), providing for compensation to all persons having any interest in the land taken. **BUTTERWORTH-JUDSON CO. v. CENTRAL RAILROAD CO.** 568
5. — Where the owner of land granted defendant the right to dig and build a reservoir at a certain spring on the land, the reservoir not to occupy more than one-half acre, and to lay pipes therefrom over such land and to draw the water from the reservoir, and defendant located a reservoir, an injunction would lie at the suit of the owner to restrain him from entering, after ten years, to put down a well in order to acquire an additional supply of water, although the well would be within an area, including a reservoir, of one-half an acre, if the boundaries should be fixed as desired by defendant. **SKED v. PENNINGTON SPRING WATER CO.** 599
- See COVENANTS, 15; TELEGRAPH AND TELEPHONE LINES.*

ESTOPPEL—See TAX TITLE.

EVIDENCE—1. The official record of the contents of an ordinance may not be varied by parol. *FOGG v. OCEAN CITY SEWER Co.*... 736

2. — The owner of a tract of land conveyed it to two persons as tenants in common, the deed providing that it was agreed between the parties that it should not "conflict with the title" to any part of the granted premises previously conveyed by the grantor to any parties. Thereafter one of the grantees sued to recover possession of a parcel of the tract, and in such action the grantor of the tract gave a deposition to the effect that he had conveyed the land involved in the action to a certain person prior to the conveyance to plaintiff therein and her co-tenant, and he refreshed his memory by reference to a book kept by himself showing the various conveyances which had been made, and by consent a copy of the book was made and used on the trial. Subsequently those representing the title conveyed to plaintiff in such action sued for partition of another parcel of the tract, and defendant claimed that the land sought to be partitioned was not included in the original conveyance of the tract, and sought to show the same by producing the copy of the book which had been introduced in the former action, and by proving that it was a true copy, without any proof of any effort to produce the original. It was not shown that the one to whom defendant claimed the original owner had conveyed the land had ever claimed title, or that he was in any possession claiming under a lost deed.—*Held*, that such evidence was insufficient to establish defendant's claim. *ROLL v. EVERETT*..... 20
3. — A written contract with the United States government, providing for payment "at such times and in such amounts as the officer in charge of the work might elect," cannot be varied by parol evidence that government officers stated, when attention was called to such provision just before signing, that payments could be expected every thirty days. *RAMSEY v. PERTH AMBOY SHIPBUILDING, &C., Co.*..... 165
4. — In a suit to set aside an assignment of a leasehold interest on account of the mental incapacity of the assignor, the finding of a committee in lunacy, a few months after the conveyance, declaring the assignor a lunatic, is only *prima facie* evidence of his incompetency. *SHARBERO v. MILLER*..... 249
5. — In a suit to set aside an assignment of a leasehold interest on the ground of the mental incapacity of the assignor, evidence examined, and *held* to fail to show that there was any such impairment of the assignor's mind as made him incapable of understanding in a reasonable manner the nature and effect of his acts or of the business that he was transacting, essential to warrant a decree of cancellation. *Id.*..... 249

EVIDENCE—Continued.

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6. — In a suit to set aside an assignment of a leasehold interest on the ground that the purchaser paid less than the market value for it, evidence examined, and *held* not to establish that there was any market value of the leasehold interest in excess of what was paid for it. *Id.*..... 249
See GIFTS, 1.

7. — Where a plaintiff sued in his lifetime to compel specific performance of an alleged verbal promise by his wife that on the death of either certain land which complainant had purchased in her name should become the land of the survivor, the wife's executor being a necessary party in his representative capacity, both because he had a power of sale under the wife's will and because he might need the proceeds of a sale of the property to pay debts, the husband was not a competent witness, under *P. L. 1900 p. 362*, excluding a party as a witness, where the opposite party is sued in a representative capacity. *LIPP v. FIELDER* 439

- EXCEPTIONS TO REPORT—1.** Where a special order was made in a case on notice in regard to the signing of testimony on reference to a master, and that order has not been appealed from, exceptions to the testimony on the ground that it had not been read over or signed by the witnesses cannot be considered as well founded on exceptions to the master's report. *LEACH v. LEACH* 571

2. — Where exceptant was not aggrieved by reason of the failure of a master in chancery to report on a matter as directed, his exceptions on account thereof will be overruled. *Id.*..... 571

- EXECUTIONS—1.** Where no levy is made under a writ of execution before its return, power to perfect the lien of the writ is lost, and any personalty not levied upon before such return may be subjected to a subsequent judgment creditor's execution. *OLDEN v. SASSMAN*..... 637

2. — A sheriff's levy upon personalty particularly described, "and all other goods and chattels belonging to" defendant, did not cover a leasehold interest not part of the personalty particularly described, the officer who executed the writ not knowing of the property until he was asked to and did levy upon it under another writ after power to levy under the first writ had expired, and hence the subsequent execution creditor was entitled to the proceeds of the sale of the leasehold interest. *Id.*..... 637
See JUDICIAL SALES.

- EXECUTORS AND ADMINISTRATORS—1.** Where an executor has paid the collateral inheritance taxes upon legacies given by the will, although it is his duty to deduct such tax at settlement

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with the legatee, under *Gen. Stat. § 340 ¶ 268*, he may properly make the payments and have allowance for them in his final account. *WYCKOFF v. O'NEIL*..... 879

2. — An executor is not ordinarily compelled to pay such tax until the expiration of the year allowed him by law for the settlement of the estate, and he should not be refused allowance for such interest as he would be required to pay if the tax were paid within the year. *Id.*..... 879

3. — He will not ordinarily be chargeable with interest on moneys in his hands uninvested for and during the year allowed him in which to settle the estate. *Id.*..... 879

4. — An executor is not entitled to commissions until his accounts have been settled and allowed by the court, and if he withdraws from the estate prior to such settlement any money on account of such commissions he will be chargeable with interest thereon to the time of his accounting. *Id.*..... 879
See INSOLVENT ESTATES; LEGACIES, 4; ORPHANS COURT; TRUSTEES.

F.

FEIGNED ISSUE—When a feigned issue is framed in equity and sent to a law court for trial before a jury, it is proper for the trial court to direct a verdict if the evidence justifies the peremptory instruction given. *SPARKS v. ROSS*..... 762

FRANCHISES, PUBLIC—1. The legislature has the power to bestow upon an individual the right to exercise those public franchises which can only be exercised through legislative sanction to the same extent that such powers can be bestowed by legislative enactment upon private corporations. *MCCARTER v. VINELAND LIGHT AND POWER CO.*..... 767

2. — The act of March 11th, 1842 (*P. L. 1842 p. 164* which has been preserved by *Rev. Stat. 1846 p. 136 tit. 5 ch. 3 § 20; Rev. p. 192 § 85; P. L. 1896 p. 303 § 82*), authorizing the franchises of public utility corporations to be sold through the medium of receiverships, sanctioned the use of such franchises by an individual purchaser. *Id.*..... 767

3. — The act of March 11th, 1842, and the subsequent acts extending its operation, will not receive that strict construction which is applied to legislative grants, because the act grants no new rights, but simply makes provision for the transmission of title, by sale or lease, of rights already granted. *Id.*..... 767

4. — The act of February 17th, 1881 (*Gen. Stat. p. 3694 §§ 34, 35*), operates to withdraw legislative sanction for the use, by an

FRANCHISES, PUBLIC—Continued.

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individual, of the sovereign prerogatives purchased under decrees of courts, and requires their use by corporations created by the act *ex proprio vigore*. *Id.*..... 767

5. — On information, filed by the attorney-general, this court may restrain the unwarranted use of sovereign prerogatives. *Id.*, 767

FRAUD—1. The court of chancery possesses a general jurisdiction in cases of fraud, as well where there is a plain, adequate and complete remedy at law, as in other cases. *MAZZOLA v. WILKIE*, 722

2. — The fraud in obtaining a foreign judgment for which equity will enjoin execution of a domestic judgment founded on the foreign judgment does not relate to the cause of action, or to evidence adduced before the foreign court, but to deception and downright fraud in procuring jurisdiction, or in preventing defendant, by fraudulent means, from presenting his defence. *WILSON v. ANTHONY*..... 836

FRAUDULENT CONVEYANCES—1. In a contest between creditors and the wife of their debtor, where she seeks to sustain a conveyance as a security for a debt, the burden is on her of showing the amount of the debt sought to be protected, and is not discharged by a mere general statement regarding the amount due. *CRAMER v. CALE*..... 210

2. — Evidence examined, and the conveyance to the wife held to be only a mortgage, given to secure whatever advancements of moneys she may have made from her separate estate, the equity in the property comprised in the deed of conveyance being subject to the payment of complainants' debt. *Id.*..... 210

G.

GAS COMPANIES—The act of March 27th, 1878 (*Gen. Stat. p. 1613 § 33*), providing that whenever it may be necessary for any gaslight company to increase its bonded indebtedness it may, by a majority vote of its board of directors, with the consent of a majority of the stockholders holding sixty per cent. of the capital stock, increase the bonded indebtedness to an amount not exceeding two-thirds of the amount of the capital stock, merely conferred additional powers on such corporations as were not previously allowed to issue bonds to the amount fixed by the act, and did not restrict the privileges of those that already possessed the power to create bonded indebtedness to a greater amount than that named in the act. *THATCHER v. CONSUMERS' GAS AND FUEL CO.*..... 826

GENERAL PROPRIETORS OF EASTERN DIVISION OF NEW JERSEY—1. A resolution of the General Proprietors of the Eastern Division of New Jersey that no surveys to be made

GENERAL PROPRIETORS OF EASTERN DIVISION OF
NEW JERSEY—*Continued.*

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- in right of a dividend declared by the proprietors should comprehend water, rivers, brooks or creeks, without including a proper quantity of land on each or either side thereof, is broad enough to cover a fresh-water lake. PROPRIETORS OF EASTERN NEW JERSEY *v.* FORCE'S EXECUTORS..... 56
2. — A survey of land of the General Proprietors of the Eastern Division of New Jersey under a warrant passes no title as between the proprietors and its own officer, surveyor-general or register, unless approved by the council of proprietors, and if the survey and return be such that it is manifest that the council would not have approved them, and such that the officer in whose favor they were made could not have compelled the council by legal proceedings to approve them, the return, so far as regards that officer, cannot be held valid. *Id.*..... 56
3. — A return by the surveyor-general of the General Proprietors of the Eastern Division of New Jersey on a survey of a pond alone in three instances, two to himself, which surveys united in himself the offices of surveyor-general and register, and both of which surveys purported to include land as well as water, and which, so far as appears, may have been made clandestinely and without the consent of the proprietors, and the third to another, who was a large individual proprietor of which the same might be said, is sufficient to show a waiver of the rule of the proprietors that no survey of land under a pond by itself should be made without the express consent of the council. *Id.*..... 56
4. — An appointment of a deputy surveyor-general of land of the General Proprietors of the Eastern Division of New Jersey ought not to have been made without the approval of the council. *Id.*, 56
5. — The General Proprietors of the Eastern Division of New Jersey were the legal owners of all unappropriated lands in East New Jersey against which were outstanding warrants of location. The proprietors claimed that they had the exclusive right to all of the lakes, and that they were not subject to be appropriated by ordinary outstanding warrants. The power of appropriating them to warrants rested in the surveyor-general and the register, but more particularly, perhaps, in the surveyor-general, who was the officer who, by long-settled practice of the proprietors, had the power to make a "survey" either in person or by a deputy at the request of a warrant-holder, and then to make a "return" to him, thereby appropriating a certain portion of the land to him in satisfaction of his warrant.—*Held*, that it was not competent for the surveyor-general and register, both of whom were also members of the executive committee of the council of proprietors, to make a survey and return on any lakes for their own benefit, and that such action was a clear breach of trust, from which they would not be permitted to take any benefit. *Id.*..... 56

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NEW JERSEY—*Continued.* PAGE.

6. — This was true, admitting that the holder of warrants had an absolute right to have them located on the lands of the General Proprietors of the Eastern Division of New Jersey. *Id.*... 56

7. — The General Proprietors of the Eastern Division of New Jersey is a corporation, and the individual holders of the proprietary shares, though holding the legal title, are no more proper or necessary parties to a suit for an accounting and to recover the equitable title to lands than would be the individual stockholders in any other corporation. *Id.*..... 56

8. — If, on a bill by the General Proprietors of the Eastern Division of New Jersey for an accounting and to recover the equitable title to lands, the individual holders of the proprietary shares should be made parties, it would not be obligatory to make them parties complainant, but they might be made parties defendant, and, as such, would not be barred by the statute from testifying as to conversation or transactions had with the deceased defendant. *Id.*..... 56

9. — On a bill by the General Proprietors of the Eastern Division of New Jersey for an accounting and to recover title to lands, a paper found among defendant's private papers, and purporting to be a minute of the proceedings of the executive committee of the proprietors, was improperly admitted in evidence over the objection that it did not come from the possession of the complainant, and that there was no proof that it was ever adopted by the executive committee, or that it was the same which was read, if any was read, before the council of proprietors at a subsequent date. *Id.*..... 56

10. — Letters of one who was both the surveyor-general of the General Proprietors of the Eastern Division of New Jersey and a member of the executive committee, but whose duties did not authorize him to bind the proprietors except in matters of the actual survey and allotment of lands, are not admissible against the proprietors as to another matter. *Id.*..... 56

11. — One who contracted with the General Proprietors of the Eastern Division of New Jersey relative to hunting for vacant land and the sale thereof will not be permitted to claim under a construction of the resolution constituting the contract different from that which the proprietors were induced by his active efforts to put on it, or, at any rate, which with his acquiescence they did in fact put on it. *Id.*..... 56

12. — Under a resolution of the General Proprietors of the Eastern Division of New Jersey that the register proceed to have the records examined with a view to the locating and making sale of all unlocated lands, and that he should be entitled to compensation for such surveys to sixty per cent. of the lands so

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located or of the proceeds of sales thereof, the register was not entitled to commissions on a sale made before the adoption of the resolution. *Id.*..... 56

13. — No estoppel can arise against the General Proprietors of the Eastern Division of New Jersey because of acquiescence in an account presented under a resolution that the register proceed to have the records examined with a view to locating and making sale of unlocated lands, and that he should be entitled to compensation for such surveys to sixty per cent. of the lands located or of the proceeds of sales thereof, with an allowance for surveyors' fees that should not exceed twenty per cent. of the sum he might expend therefor on all sales made, where no irretrievable action has been taken by the register, based on the proprietors' silent acquiescence, and they acted as soon as they discovered the errors and ascertained their rights under the resolution. *Id.*..... 56

14. — Under the rule that the words of an instrument shall be taken most strongly against the party employing them, a resolution of the General Proprietors of the Eastern Division of New Jersey prepared by the register that the register proceed to have the records examined with a view to locating and making sale of all unlocated lands, and that he should be entitled to compensation for such surveys to sixty per cent. of the lands located or of the proceeds of sales thereof, with an allowance for surveyors' fees that should not exceed twenty per cent. of the sum he might expend therefor on all sales made, is confined to "unlocated lands," and casts the burden of expense in hunting for lands on the register, he to get back from the proprietors twenty per cent. of the sum expended. *Id.*..... 56

15. — The register of the General Proprietors of the Eastern Division of New Jersey and member of the executive committee is entitled to no compensation on a sale of land of the proprietors by him in breach of his duty to secure the best price he could get. *Id.*..... 56

16. — Three several methods of passing title to lands, in use for many years, by the Proprietors of East Jersey stated and explained. The *dictum* on that subject by the court in *Jennings v. Burnham*, 56 N. J. Law (27 Vr.) 289, commented on, doubted, and not followed. *Id.*..... 56

- GIFTS—1. Under *P. L. 1900 p. 363 § 4*, excluding testimony by a party to an action as to a transaction with a decedent, a party seeking to establish a gift *causa mortis* was not competent to testify to the delivery of a package to her by the deceased, but might testify as to what occurred after carrying the package out of the room in which it was claimed delivery was made. *VAN WAGENEN v. BONNOT.*..... 143

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2. — The return of a package containing an alleged gift *causa mortis* to the donor was a resumption of possession and, *ipso facto*, a revocation of the gift. *Id.*..... 143
3. — Savings bank-books are proper subjects of gifts *causa mortis*. *Id.*..... 143
4. — Evidence considered, and *held* to establish a gift *causa mortis*. *Id.*..... 143
5. — A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it, and of vesting title in the wife. *FARROW v. FARROW*..... 421

H.

HABEAS CORPUS—*See* INFANTS.

- HUSBAND AND WIFE—1. The law authorizing the payment of a sum in gross to the holder of a life estate, out of the proceeds of land sold on foreclosure proceedings, on consent of the person entitled thereto (*Chancery Act, Revision, P. L. 1902 pp. 531, 532 § 60*), passed subsequent to the marriage of complainant, the remainderman, to one of the defendants and after his title accrued, is not unconstitutional as depriving him of a vested right without his consent, since the amount to be paid to the life tenant is only the value of her interest, and the remainderman's rights beyond that are secure. *TUITE v. TUITE*..... 740
2. — Where, after the death of defendant's husband, she assumed control of his estate without any administration being declared thereon, she was chargeable with the value of the property derived from her husband, less all payments made by her with which a lawful administrator might have been credited, under the express provisions of *2 Gen. Stat. p. 1426 § 3*. *Id.*..... 740
See CREDITOR'S BILL; INFANTS.

I.

- INFANTS—1. Where a decree awarded the custody of certain children to their mother, but authorized the father to visit them at specified intervals, a letter written to the father by the mother's father that the mother had moved from New York to Portland, in the absence of any showing that the mother had authorized such statement, was insufficient to show that the mother had changed her permanent residence from New Jersey to Maine. *DIXON v. DIXON*..... 589

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2. — Where, in a proceeding to determine the custody of certain children, the mother answered, claiming the custody of the children, and the court awarded the same to her, with the provision that the father should be permitted to visit them, and it was established in that proceeding that the mother and the children were residents of New Jersey, the court, having acquired jurisdiction in the first instance, was entitled to modify the previous decree, notwithstanding the removal of the mother and children to another state. *Id.*..... 589
3. — A petition for the custody of children, as between parents living separately, authorized by *P. L. p. 263 § 8*, in which a writ of *habeas corpus* may issue, as provided by section 12, is not a common-law *habeas corpus* proceeding, such writ being merely ancillary for the purpose of enabling the court to obtain jurisdiction of the children. *Id.*..... 589
4. — Where parents are living separately, the court may order their children kept within the state, or, if absent, brought within it. *Id.*..... 589
5. — Where the custody of children was awarded to the mother, who was living separate from the father, a modification of such order would not be made merely because the mother had taken the children to Maine, in the absence of proof that she intended to keep them there permanently, and to prevent the father from visiting the children as provided by the decree. *Id.*..... 589
6. — Though the removal from the state, by defendant in a divorce suit, without consent of petitioner or order of court, of the minor child, custody of which was awarded defendant, with right of visitation to petitioner, was contrary to *P. L. 1902 p. 259 § 7*, petitioner cannot be relieved from making payments for maintenance of such child, which have accrued under the order of court, without complaint to the court touching such removal. *FEINBERG v. FEINBERG.*..... 810

INFORMATION—*See* FRANCHISES (PUBLIC), 5.

- INJUNCTIONS—1. If it be the rule that a sheriff must first levy an execution on personal property before levying on real estate, his impropriety in not doing so is a subject for correction by the court out of which execution issued, and the debtor cannot invoke injunctive relief. *PALLADINO v. HILPERT.*..... 270
2. — A court of equity will enjoin the unlawful invasion of a statute franchise. *MILLVILLE GAS LIGHT CO. v. VINELAND LIGHT, & C., CO.*..... 305
3. — The restraining power of a court of equity is exercised for the protection of rights, the existence of which are clearly estab-

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lished, and so far only as may be essential for the protection of those rights. *Id.*..... 305

4. — Injunction denied because of want of sufficient certainty as to complainant's rights. *Id.*..... 305

5. — Equity has no jurisdiction of a suit by an owner of property in a block through which an elevated railroad was about to be constructed, crossing and vacating a street on which complainant's property abutted, to enjoin its construction, unless complainant, by the undisputed facts of the case, and according to the settled law of the state, establishes his legal private right in that part of the street which would be vacated by the construction of the road. *ROBERTS v. WEST JERSEY AND SEASHORE RAILROAD CO.*..... 327

6. — In a suit to enjoin the construction of an elevated railway, and the vacation of a certain street therefor, the fact that the legal right on which complainant founded his claim was wholly settled was not shown, where it did not appear that his predecessor in title purchased by reference to the street, the vacation of which was sought to be enjoined, at any time prior to its becoming a public street, though it was alleged that complainant's predecessor in title and the other owners on that street widened it by vacating ten feet of their respective fronts, thus making the several properties more valuable, and increasing the price the complainant was obliged to pay for his property. *Id.*..... 327

7. — Nothing short of threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must result in irreparable damages, will justify the granting of an injunction staying an important public work, such as the construction of an elevated railroad and the vacation of a street therefor. *Id.*..... 327

8. — An injunction will lie to restrain a railroad from occupying complainant's real estate, and to compel the removal of its tracks, unless compensation be made. *BUTTERWORTH-JUDSON CO. v. CENTRAL RAILROAD CO.*..... 569

9. — Preliminary injunction refused because the rights of complainant were not clear. *BURRELL v. MIDDLETON*..... 774

INSOLVENT CORPORATIONS—1. Under the General Corporation act (*P. L. 1896 p. 298 §§ 65, 68*), the title of an insolvent corporation to its property continues until there is either an adjudication of insolvency or the appointment of a receiver or trustee. *SQUIRE v. PRINCETON LIGHTING CO.*..... 883

2. — Upon the filing of a bill of complaint against an insolvent corporation, under section 65 of the General Corporation act (*P. L. 1896 p. 298*), the court of chancery made an order re-

INSOLVENT CORPORATIONS—*Continued.*

PAGE.

straining the corporation from paying or transferring its moneys and effects, or contracting any debts, and from selling, assigning or transferring its property, and also requiring it to show cause on a later day why an injunction should not issue and a receiver be appointed. Thereafter, and before the hearing of the order to show cause, a common-law judgment was recovered against the corporation, upon which execution was issued to the sheriff, who made a levy upon personal property of the corporation sufficient to satisfy the judgment. Upon the hearing of the order to show cause, a receiver was appointed, who took possession of the personal property upon which levy had been made and used it for the benefit of the estate of the corporation.—*Held*, that the judgment creditor was entitled to priority in payment. *Id.*..... 883

INSOLVENT ESTATE—1. A personal representative, administering an insolvent estate under the statute, may present his own claim against the estate, and, unless it is made to appear to be dishonest or fraudulent, may be admitted to participate in the distribution of the assets on the same footing as other creditors.

WHEEDON *v.* NICHOLS..... 366

2. — When a claim against an insolvent estate is excepted to, the orphans court has jurisdiction to adjudicate thereon, unless the claimant elects to proceed against the personal representative at law or in equity. When such election is made by a third party the personal representative is not bound to interpose the bar of the statute to limitations. *Id.*..... 366

3. — As a personal representative who has presented his own claim against the estate cannot elect to proceed at law or in equity against himself, the jurisdiction of the orphans court cannot be taken away; but if the claim of the personal representative against the estate is not made to appear to be dishonest or fraudulent, the orphans court cannot disallow it solely on the ground that the statute of limitations has run against it. *Id.*.... 366

INTERPLEADER—The right to file a bill of interpleader is not lost by filing pleas in bar in actions brought at law, unless the defence at law is persisted in until verdict. *MAXWELL v.*

LEIGHTMAN 780

J.

JUDGMENTS—1. Judgments are presumptively only conclusive against parties in the character in which they sue or are sued.

SBARBERO *v.* MILLER..... 249

2. — The necessity of mutuality in estoppels by record requires that a court should not hold a judgment conclusive in favor of a person, unless it would be equally conclusive against him. *Id.*... 249

JUDGMENTS—*Continued.*

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3. — A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. *Id.*..... 249

4. — A judgment in favor of plaintiff in ejectment, defended on the ground that his title was founded on a conveyance executed by one not having sufficient mental capacity, is not *res judicata* that the grantor was *non compos*, although the jury, in a special finding, so found. The judgment being entered for plaintiff, this element did not enter into it. *Id.*..... 249
See FRAUDS.

JUDICIAL SALES—1. In a suit to restrain an execution sale, evidence considered, and *held* insufficient to show that the real estate in question sold for an inadequate price. *PALLADINO v. HILPERT*, 270

2. — In a suit to restrain an execution sale, it appeared that before the writ was issued, the attorneys of the judgment creditor notified the debtor that the judgment had been docketed, and that, unless he settled, they would issue an execution; that he paid no attention to such communication, and that the sheriff, in levying actually notified the debtor, and after the execution was levied, the attorneys again wrote the debtor, notifying him that the property would be advertised for sale. The debtor testified that he had gone to a lawyer to have the judgment opened, and that, as the lawyer told him not to do anything, he supposed the lawyer was taking care of him.—*Held*, that the facts were insufficient to show that the debtor was under any mistake or misapprehension as to the situation, whereby he failed to protect himself at the sale. *Id.*..... 270

JURISDICTION—1. The bill averred that defendant maintained a mill-dam which caused backwater to overflow complainant's cranberry bogs. The answer denied that the dam occasioned the overflow of complainant's land and also set up a prescriptive right to maintain the dam as it was.—*Held*, that the court of chancery is without jurisdiction to try these issues. *DEFLIANCE FRUIT Co. v. FOX*..... 298

2. — The bill is retained to enable complainant to establish its right at law because the answer failed to deny the jurisdiction of the court, and the bill sought mandatory relief which could be appropriately granted after complainant's right at law should be established. *Id.*..... 298

3. — The action at law to recover a distributive share of an estate given by statute is a remedy in addition to that existing in equity, and in no way limits or qualifies the jurisdiction of the chancery court. *VAN DYKE v. VAN DYKE*..... 300

4. — This court will enjoin the execution of a judgment at law, rendered in an action of ejectment, when it appears that the

JURISDICTION—Continued.

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- defendant in the legal action had an equitable estate in the *locus in quo* which was sufficient to afford him equitable protection against dispossession at the instance of the plaintiff and the existence of which equitable estate afforded no defence in the court of law. ATLANTIC CITY RAILROAD CO. v. JOHANSON..... 332
5. — Where the defendant in ejectment purchased the *locus in quo* by parol agreement from the predecessor in title of the plaintiff and paid the full consideration of the purchase and entered into possession by consent of the vendor, the statute of frauds is not a bar to the existence of an equitable estate in the purchaser. A subsequent purchase of the land from the record owner by the plaintiff in ejectment, at a time when the defendant in ejectment was in visible possession under his prior purchase, is with constructive notice of the equitable estate of the defendant and constitutes the subsequent purchaser a trustee of the legal estate for the benefit of the prior purchaser. As such trustee the subsequent purchaser can maintain an action of ejectment against his *cestui que trust*, and the latter can only defeat recovery in a court of equity. *Id.*..... 332
6. — The fact that the *locus in quo* was a highway, and that the possession of defendant consisted of the occupancy of the highway with a steam railway, does not militate against the application of the principles defined. *Id.*..... 332
See DISTRIBUTIONS; INJUNCTIONS.
7. — A wife sued for divorce, for the custody of the children, and for alimony. The husband, a non-resident, was only brought in by publication and personal service out of the state of a notice of the pendency of the suit. He did not appear. A decree as prayed for was granted. His property in the state was sequestered to enforce the decree. He filed a petition attacking the validity of the decree for lack of jurisdiction, and prayed for the vacation thereof, for the setting aside of the writ of sequestration and for the dismissal of the bill, and for "other and further relief."—*Held*, that his appearance for this purpose was not a general submission to the jurisdiction of the court, and did not operate to give validity to the adjudication against him of which he complained. MCGUINNESS v. MCGUINNESS..... 381
8. — An award of alimony, in a decree for divorce, whether absolute or from bed and board, is void against a defendant who has not been served with process within the state and has not entered an appearance in the suit; and is not enforceable against property of defendant within the state. *Id.*..... 381
9. — A complaint in a court of chancery by *cestui que trust* under a will alleged that defendants, as trustees under the will, had received money and property belonging to the estate and had never accounted therefor, and asked that they make a dis-

JURISDICTION—*Continued.*

PAGE.

covery of all property which had come into their possession as trustees, and that they be required to file an account showing all their transactions and a schedule of all property in their possession. Subsequently to filing of the bill, but prior to the service of subpoena on defendant trustees, they filed with the prerogative court an account purporting to show all their transactions as such trustees to several items of which exceptions were then pending, and these facts were pleaded to the action in chancery. It did not appear that any of the parties knew of the proceedings of the others prior to the service of the subpoena on defendants.—*Held*, that the jurisdiction of the chancery court had been properly invoked, and that the court would maintain jurisdiction, since it had first taken it. *GILLEN v. HADLEY*.... 506

10. — In a suit in chancery, if a question arises as to the validity of a devise in a will, and the reading of the clause in question does not settle the matter, the court may hold the bill until an action at law is brought to establish the title, or it may refer the question to a court of law for an opinion thereon as provided by Chancery act of 1902, section 79. *P. L. 1902 p. 537. Id.*.... 506
11. — A bill in chancery by a *cestui que trust* under the will of a testator alleged that temporary annuities given by the will had ceased by the death and the attaining of majority of the beneficiaries thereof, and that all of the temporary purposes for which the trustees were directed by will to hold certain real estate had ceased and been determined, and that a certain devise in trust was void, because the ultimate disposition of the residue violated the rule against perpetuities, and that complainant was entitled to the same as an heir of testator, and, in addition to a general prayer, the bill asked that the executors give a full account of the estate and make discovery of their transactions as such, and as to what sums of money had been realized from the sale of real estate, and asked that the portion of the will attempting to create a perpetuity be declared null and void, and that the oratrix receive her share of the estate of the decedent.—*Held*, that the bill made a case within the jurisdiction of the court independent of the title to the real estate. *Id.*..... 506
12. — A garnishee by a statutory plea denying indebtedness to the defendant in attachment being entitled to raise the question at law whether the defendant in attachment could lawfully exercise an option in a contract to declare the contract void, and thus discharge the garnishee's obligation to make payment under the contract, the garnishee was not entitled to maintain a bill to enjoin the proceedings at law in order to obtain a determination of such question in equity. *CONTINENTAL COMPRESSED AIR Co. v. FRANKLYN*..... 819
13. — The remedial powers of a court of equity to enforce by injunction equitable rights which cannot be enforced at law may be exercised after, as well as before, judgment at law. *Id.*..... 819

JURISDICTION—*Continued.*

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14. — A court of equity will not assume jurisdiction to try a controverted legal title to an easement of way, but when the substantive right which complainant seeks to enforce or protect consists of an equitable estate in lands, a court of equity has primary jurisdiction. *BURRELL v. MIDDLETON*..... 774
See ACCOUNTING; MECHANICS' LIENS, 4.

L.

LACHES—1. Laches will not be imputed to a husband merely from his failure to prosecute a suit against his wife during the continuance of the marital relation. *BENNETT v. FINNEGAN*..... 155

2. — Whether a court will strike out a bill on the allegation of laches is a matter of discretion, and the court will generally permit the proving of the facts excusing laches and determine whether such facts excuse. *STEVENSON v. MARKLEY*..... 686
See CORPORATIONS, 2; COVENANTS, 6; LEGACIES, 7; MORTGAGES, 3.

LEGACIES—1. A bill may be filed in the chancery court for the recovery of a legacy or distributive share, either before or after a settlement in the orphans court. *VAN DYKE v. VAN DYKE*... 300

2. — An action at law to recover a distributive share of an estate is purely statutory, and can be maintained only after a decree of distribution. *Id.*..... 300

3. — Where an executor was to invest a sufficient sum to produce \$1,200 annually, which was to be paid to the annuitant during her natural life, "in payments quarterly of three hundred dollars each," such bequest is an annuity. *STEELMAN v. WHEATON* 627

4. — Where an administrator *pendente lite* pays a legacy to a person entitled to it, which the character of his appointment does not authorize him to do, he will nevertheless be allowed such payment in his accounting, if the estate was able and liable to pay after all prior charges were provided for. *Id.*..... 627

5. — Where a testator follows bequests of pecuniary legacies with a general residuary clause, the legacies are charged upon the entire residuary estate, real and personal, and remain so charged until paid, the lien upon the realty being not contingent upon the insufficiency of the personalty at the testator's death or at the final accounting, and it being immaterial that the lega-

LEGACIES—Continued.

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cies fail of payment out of the personalty, because it has been wasted, embezzled, misappropriated or destroyed. *PATERSON GENERAL HOSPITAL ASSOCIATION v. BLAUVELT*..... 725

6. — A legatee was not barred by laches in 1906 from suing to enforce its lien upon the residuary realty, where testatrix died May 6th, 1892, and January 5th, 1899, the legatee obtained a decree requiring the executor to pay the legacy and he refused to pay it on the ground he had no assets in his possession. *Id.*.... 725

7. — A presumption of the payment of a legacy does not arise until after twenty years from the accrual of the right to it. *Id.*..... 725

8. — Under *Gen. Stat. p. 1938 § 1*, providing that where no time is fixed by a will within which legacies are to be paid, the executors have one year after probate in which to make payment, where an order of the orphans court admitting a will to probate was suspended by appeals, the executor had one year from the day certified copies of the decrees of the appellate courts were filed with the surrogate and probate adjudged by him within which to pay the legacies. *SMITH v. SMITH*..... 777

LICENSE—A paper, entitled "Application for Sewer Attachment," executed by a property owner and a sewer company, providing that the company agrees to allow the owner to make attachment of his property to the main sewer pipe, sewer to be used at named rates per year, and that the owner makes application for sewer attachment as above, and agrees to comply with all the company's present and future rules relative to the use of sewer, is a license to connect, and an arrangement from year to year only, so that the company, on giving due notice, can charge a higher rate for subsequent years, up to the limit allowed by ordinance. *FOGG v. OCEAN CITY SEWER CO.*..... 736

LIENS—See ATTORNEY AND CLIENT.

LIFE TENANT AND REMAINDERMEN—1. A testator gave the residue of his estate to his executors to take possession thereof, collect the rents, pay taxes, assessments and liens, and directed that the executors should set apart a specified sum for a trust fund, divide the residue into equal shares, some of which were given absolutely and others in trust. The testator left real estate unimproved, against which municipal assessments had been levied. The executors had not divided the residuary estate.—*Held*, that as to the assessment for municipal improvements there must be an equitable apportionment between the tenants for life and the remaindermen, by the payment of the whole sum out of the principal, and providing that each year interest should be calculated on the amount paid, and deducted from the income. *BROWN v. BROWN*..... 667

LIFE TENANT AND REMAINDERMEN—Continued. PAGE.

2. — Where a testator leaving real estate died June 30th, and the estate was subject to assessment for taxes as of May 20th in the name of the owner thereof at that date, the executors were required to pay the taxes out of the estate and charge the same against the principal. *Id.*..... 667
3. — A testator owned stock in a corporation, which, after his death increased the authorized stock, and gave to the shareholders the right to subscribe to the increased issue. This right the executors sold for a substantial sum.—*Held*, that the sum thus received became principal, and did not go to the life tenants of the stock. *Id.*..... 667
4. — A testator owned a specified number of shares in a trust company, and after his death the stock of the company was increased and allotted to the shareholders. At the same time the company declared a dividend, and provided that the right to subscribe to the new stock and the right to receive the dividend should accrue simultaneously. The executors paid for the stock with the dividends.—*Held*, that the stock so purchased must be held to be a dividend as between life tenants and remaindermen. *Id.*..... 667

LIMITATIONS, STATUTE OF—1. Limitations do not run against a claim of a husband against his wife during the continuance of the marital relation. *BENNETT v. FINNEGAN*..... 155

2. — A ward attaining her majority in 1883 died in 1885, before the guardian had rendered an account. The guardian died in 1905. In 1906 an administrator of the deceased ward was appointed, who, in the same year, sued the representative of the deceased guardian for an accounting.—*Held*, that the suit was not barred by limitations, though the cause of action accrued on the ward's death, since limitations did not begin to run until the appointment of her representative. *STEVENSON v. MARKLEY*, 687

M.

MARRIAGE—1. A ceremonial marriage was followed by fifteen years' cohabitation, and terminated only by the death of the husband. During that time a family of children was raised by the parties to the marriage. These facts created a powerful presumption of the legality of the marriage. To have overcome this presumption sufficiently to have justified an instructed verdict against its legality, the evidence of a prior marriage should have been conclusive in its nature. *SPARKS v. ROSS*..... 762

2. — The presumption of legality arising from a ceremonial marriage followed by cohabitation of the parties as husband and wife, is founded upon the motives which govern human conduct

MARRIAGE—Continued.

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and upon the policy of our social system. The conclusion of illegality involves the assumption that the parties have exposed themselves to the penal consequences of illegal acts, and operates to bastardize their offspring. The strength of the presumption increases with the lapse of time through which the parties have cohabited as husband and wife. *Id.*..... 762

3. — Certain proofs offered of a prior marriage *held* to be insufficient to justify an instruction against the presumption of legality of a subsequent marriage, followed by long cohabitation. *Id.*, 762

MARRIED WOMEN—The common-law rule that "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life," has not been abrogated by our Married Woman's act (*Gen. Stat. p. 2012*), or by any other statutory provision. *FARROW v. FARROW*..... 421

MAXIMS—1. One who appeals to a court of equity must do equity. *PROPRIETORS, &c., N. J. v. FORCE*..... 56

2. — The words of an instrument shall be taken most strongly against the party employing them. *Id.*..... 126

3. — The maxim, "One who comes into equity must come with clean hands," is based upon conscience and good faith, and the bad faith or the unconscionable conduct that will justify the application of this maxim must be based upon actual knowledge, or willful fraud. The fraud of an agent that is by mere imputation chargeable upon a complainant will not render the hands of the latter unclean within the meaning of this maxim. *VULCAN DETINNING CO. v. AMERICAN CAN CO.*..... 387

4. — "Unclean hands," within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a court of equity, as a court of conscience, will not even listen, because the conduct of such suitors is itself unconscionable in the moral sense that imports actual knowledge. *Id.*..... 387

MECHANICS' LIENS—1. Where payments under a building contract were due on the certificate of the architect, a stop notice served on the owner on the day after the last certificate was given was insufficient to give the party serving the notice priority over other persons holding orders of the contractor upon the owner. *EDGE v. McCLAY*..... 216

2. — *P. L. 1892 p. 369*, creating a lien on funds due public contractors for the benefit of laborers and materialmen, and providing for the enforcement of such lien, does not contemplate an

MECHANICS' LIENS—Continued.

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action in the chancery court by the original contractor against the municipality. **UNITED STATES FIDELITY AND GUARANTY CO. v. NEWARK**..... 841

3. — *P. L. 1892 p. 369* creates a lien on funds due municipal contractors for the benefit of laborers and materialmen, which sections 1 and 5 declare shall extend to the full extent of the claim or demand and to the extent of the liability of the contractor for the claim preferred.—*Held*, that a proceeding to enforce such lien was a proceeding *in rem* limited to a determination of the lien claims against the contractors, and to the application of the funds due the contractors from the municipality to the extent necessary to pay such liens, or if the fund is insufficient, then to distribute the same among the lienors *pro rata*. *Id.*, 841

4. — In a suit to enforce a lien on an amount due a municipal contractor, given by *P. L. 1892 p. 369*, the court has no jurisdiction to entertain a cross-bill by the contractor's representatives for the purpose of an accounting between such representatives and the municipality. *Id.*..... 841

MERGER—See CORPORATIONS.

MISTAKE—See JUDICIAL SALES.

MORTGAGES—1. A tenant by the curtesy by virtue of title acquired by his deceased wife through conveyances from a mortgagor does not claim an interest in the premises through any conveyance which may be recorded within the Chancery act, section 58, as amended by *P. L. 1903 p. 385*, providing that in a suit to foreclose a mortgage all persons claiming an interest in the premises through a conveyance which may be recorded, and which shall not be so recorded, shall be bound by the proceedings in the suit in the same manner as if they had been made parties thereto, and the mortgagee, on purchasing the premises at the foreclosure sale, is not entitled to a writ of assistance for the summary dispossession of the tenant. **NEW JERSEY BLDG. LOAN AND INV. CO. v. SCHATZKIN**..... 175

2. — A mortgagor conveyed premises to a grantee, who conveyed to a third person, who conveyed to a married woman. At the time the mortgagee filed his bill to foreclose, the married woman was in possession and her deed recorded, but the deed to the third person was not recorded. The mortgagee only made the mortgagor and his grantee and their wives parties.—*Held*, that the husband of the married woman, who after her death claimed the premises as tenant by the curtesy, did not claim the estate under the mortgagor or his grantee, and he was not bound by the decree of foreclosure. *Id.*..... 175

3. — A mortgagee purchasing the premises at a foreclosure sale stood by for over two years after the purchase without exhibiting

MORTGAGES—Continued.**PAGE.**

his title to a person in possession under a deed recorded at the time of the filing of the bill to foreclose, or her surviving husband. They were in possession without notice of the purchaser's title.—*Held*, that the purchaser was barred by laches from obtaining the aid of a court through a writ of assistance for the removal of the husband claiming the premises as tenant by the curtesy. *Id.*..... 175

4. — Pending a foreclosure a receiver appointed by this court, and with the approbation of this court, made a lease of the mortgaged premises, expiring October 8th, 1904. The mortgaged real estate was sold by the sheriff to Carr for \$70,000. Carr paid \$5,000 to the sheriff upon the purchase. The sale was confirmed July 5th, 1904. On July 26th, 1904, the sheriff executed a deed to Carr, and notified him that it was ready for delivery. Carr did not pay the remainder of the purchase price and take the deed until September 17th, 1904, when he paid \$65,000 only. On application for the distribution of the rents collected by the receiver—*Held*, that Carr was not entitled to any part of the rents attributable to the real estate mortgaged until after he had performed the conditions of sale and accepted the sheriff's deed. *THOMPSON v. RAMSEY.*..... 457
See ACCOUNTING, 6.

5. — 2 *Gen. Stat. p. 2107 § 23* provides for entry by the clerk on the margin of a registered mortgage of a minute of its discharge. Section 25 provides that a mortgage registered or recorded shall be discharged by an acknowledged certificate, which shall be recorded. *Revision of 1846 (Nix. Dig. pp. 526, 527), Act to Register Mortgages §§ 1, 5*, the words "record" or "recording" are used synonymously with "register" or "registering." In 1858 (*P. L. 1858 p. 90*) a supplement to the act to register mortgages provides for their being registered or recorded in full.—*Held*, that the method provided in section 25 is not exclusive, but that the one contained in section 23 is equally effective. *MANCHESTER BUILDING AND LOAN ASSOCIATION v. BEARDSLEY*, 714
See CORPORATIONS, 19-22.

MUNICIPALITIES' LIEN LAW—See MECHANICS' LIENS.**N.**

- NEGLIGENCE**—In a suit by a building and loan association to foreclose a mortgage which had been canceled by its president, to whom the money had been paid, but who had failed to pay it to the association, evidence *held* to show that the negligence of the association and its officers was the proximate cause of the loss, which must be borne by the association, and that the mortgage was properly canceled. *MANCHESTER BUILDING AND LOAN ASSOCIATION v. BEARDSLEY.*..... 714

NOTICE—See CHATTEL MORTGAGES, 2, 4, 7, 11.

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- ORPHANS COURT—1. When an application is made to an orphans court for an order directing an administrator to sell lands of his intestate for the payment of debts, on the ground that the personal estate is insufficient, under the provisions of sections 82 to 90 of the Orphans Court act of 1898, and upon the return of the rule to show cause issued thereon it appears that the personal and real estate of intestate are, and are known to the administrator to be, together insufficient to satisfy the debts claimed—*Held*, that the orphans court may decline to make the order of sale, because the application should have been made under sections 99 to 110 of the act, the estate being insolvent under those sections. *GODFREY'S CASE*..... 352
2. — The proofs before the orphans court justified the inference that the administrator, in making the application under section 82 *et seq.*, instead of under section 99 *et seq.*, acted in bad faith.—*Held further*, that the orphans court may decline to make the order of sale on that ground. *Id.*..... 352
3. — Before an orphans court may make an order for the sale of lands of a testatrix to pay debts which her personal estate is insufficient to pay, the executor who seeks the order must have applied all the personal estate to their payment, including specific legacies. The legatee's right to contribution cannot be considered in the proceeding to sell land. *WHTAKER'S CASE*... 362
4. — Upon such a proceeding it appeared in the orphans court that the testatrix died seized of a number of dwelling-houses and lots, valued by the executor at \$5,600; that the debts unpaid were \$1,287.37, and if a specific legacy should be applied they would be reduced to \$287.37, and that the sale of any two houses would raise the whole of the unpaid debts, and of any one house would raise the debts after application of the specific legacy.—*Held*, that the orphans court should have directed the sale of such houses as would have been sufficient and no more, and that the order requiring the executor to sell all the houses was erroneous, there being no evidence that the sale of any one or two of them would diminish the value of the others. *Id.*..... 362
5. — The orphans court, upon an executor's accounting, may ascertain the condition of the estate as fully as the court of chancery, and in the absence of fraud, or accident unmixed with negligence or fraud on the part of the accountant, or of some matter of pure equity cognizance, the decree upon the accounting is conclusive upon the executor as to the propriety of allowances claimed by him. *WOOLSEY v. WOOLSEY*..... 898
See INSOLVENT ESTATES.

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- PARTITION**—1. In a suit for partition the court would not determine the validity of a tax title asserted by defendant, but would hold the case to await the decision of a court of law as to the validity of such title. *ROLL v. EVERETT*..... 20
2. — Where the interest of one tenant in common was sold under execution, the purchasers could not, by subsequent dealings between themselves, such as partitions and conveyances, of which no notice was brought to the owner of the remaining interest, increase the purchaser's interest in the premises. *Id.*..... 20
See GENERAL PROPRIETORS OF EASTERN DIVISION OF NEW JERSEY.
- PARTNERSHIP**—1. Defendant, on the death of her husband, continued his junk business, with the assistance of three of her six minor children, the eldest of whom was a girl of sixteen and the youngest only a month old. She collected all the money, paid all the bills, and employed such help as was necessary, and from the profits purchased certain real estate in controversy.—*Held*, insufficient to establish a partnership between defendant and her children, under which they were entitled to an equal share in the profits, while defendant was alone responsible for losses. *TUITE v. TUITE*..... 740
2. — The mother being entitled to the earnings of the children during minority, there was no consideration for such an agreement of partnership, if one was made. *Id.*..... 740
See CHATTEL MORTGAGES, 10.
- PLEADINGS**—1. A motion against an entire bill, under chancery rule 213, may be treated as essentially a demurrer to the bill. *HOLTON v. HOLTON*..... 313
2. — Where the pertinent fact alleged in a bill of complaint as ground for relief raises a doubt as to complainant's right thereto, a general specification of want of equity in a motion to strike from the files the bill of complaint is sufficient. *STEELMAN v. WHEATON* 626
- PLEDGE**—*See CORPORATIONS, 7, 8.*
- PRINCIPAL AND AGENT**—*See TRADE SECRETS, 2.*
- PUBLIC HIGHWAYS**—*See RAILROADS.*

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- QUIETING TITLE**—1. A bill reciting an agreement between the parties for the sale of real estate and charging that defendant has failed to comply with his contract of purchase, and that he has, by recording the agreement, cast a cloud over complainant's title, and praying for its removal does not state a case within *3 Gen. Stat. p. 3486*, relating to suits to quiet title, and providing that where a person is in peaceable possession of lands, claiming to own the same, and his title thereto is denied, it shall be lawful for him to bring a suit to settle the title, &c., for complainant has an adequate remedy either by a suit for specific performance or for rescission. *McCLAVE v. MCGREGOR*. 219
2. — The purpose of the statutory bill in equity to quiet title to lands, authorized by *3 Gen. Stat. p. 3486*, is to afford a remedy to a person in peaceable possession of lands where no adequate remedy at law exists. The statutory bill will not be entertained where it appears that defendant entered upon the land in question and plowed it for purposes of cultivation only a few weeks before the bill was filed, and that before the bill was filed complainant knew that the plowing had been done and was informed by his neighbors that it had been done by defendant, and, by a reasonable effort, could have procured the necessary evidence of the act of defendant to have based an action at law against him. *STEELMAN v. BLACKMAN*. 330
3. — In a suit to quiet title, a motion for a new trial of an issue directed to be tried at law will be denied by the court of chancery without examining into the merits of the decision, since an appeal can be taken as well from the judgment directed by the justice of the supreme court, as from any judgment upon the same question emanating from this court. *SCHMITT v. TRAP-HAGEN* 665
4. — The clause in section 5 of the act to quiet titles (*3 Gen. Stat. p. 3487*), which enacts that when an issue at law shall be directed to try the validity of a claim of title to land, the court of chancery shall be bound by the result of such issue, is constitutional. *BRADY v. CARTERET REALTY CO.*. 904
5. — The previous determination in this case by this court that the power conferred upon the court of chancery to take jurisdiction of this class of suits and to award a feigned issue was not in conflict with the constitution, and the further determination that the order of the chancellor refusing a new trial of the issue should be affirmed involved and settled the constitutionality of the entire provision respecting a trial at law and the finality of the verdict thereon. *Id.*. 904

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- RAILROADS**—1. A bill was filed by a city setting forth its control of public streets therein, and that a railway company, by its charter, constructed a railroad across a street of said city; that the franchises and rights of that company are now vested in one of the defendants, and that the other defendant has leased the said property and franchises, and charging that the defendants are obligated to perform the duties imposed on the railroad company which constructed the road; that across said street the defendants now have laid six tracks; that by the increase of population the street in question is used by a great number of people, and that crossing it at grade with those six tracks forms a serious impediment and obstruction to travel on the street; that by the ninth section of the charter of the railway company which constructed the said crossing that company was required to construct and keep in repair good and sufficient passages over or under said railway where any public or other road should cross the same, so that the passage of carriages, horses and cattle across the railway should not be impeded, and praying that this court should, by injunction, compel the defendants to effect the crossing of the tracks across said street in some other manner than at the grade of the street.—*Held*, (1) that upon these statements the jurisdiction of this court to make the decree prayed for is conferred by section 29 of the revised act concerning railroads, approved April 14th, 1903; (2) that the conferring of such jurisdiction upon this court was within the power of the legislature. **NEWARK v. ERIE RAILROAD Co.**..... 447
2. — The duty imposed upon the railway company which laid the tracks in question was not a duty completely performed by an original construction in conformity therewith, but it was a continuing duty, varying according to the changed circumstances, and requiring a crossing to be sufficient to permit the passage across the railway without impediment. *Id.*..... 447
3. — Such a bill is not objectionable because it fails to assert that the crossing of said street in a manner other than at grade is practicable, or because it does not specify what crossing the city seeks to have decreed. If the jurisdiction of the court is made to appear by the statements of the bill, the practicability of a safe crossing and the determination of what crossing should be made is for the court to determine. *Id.*..... 447
4. — Such a bill is not objectionable because it fails to state that notice of the intention to file such bill was given to the defendants. The notice prescribed by section 29 of the revised Railroad act relates only to the proceeding to construct such crossings by the municipality if the railroad to which notice is given does not, within a reasonable time, itself construct them. The notice fixes the commencement of the time, and has no

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relation to the application of this court to fix and determine how the crossing should be constructed under the law governing the railroad company. *Id.*..... 477

5. — The statements of the bill present a case for the jurisdiction of this court over the joint use, by the public and by a railroad company, of the same land. Where two public users are in conflict, this court may determine how the users may be continued so as to be safe and convenient. *Id.*..... 447

RECEIVERS—Sufficient ground is shown for the appointment of a receiver to protect decedent's real property, worth \$100,000, claimed by the state to escheat, and also claimed by defendant under an alleged will and by another claiming to be decedent's only heir-at-law, the lands having been sold for municipal taxes, the rents being collected by the purchasers at the tax sale, a mortgagor having filed foreclosure proceedings, defendant as administratrix having in no way attempted to protect the property, and it appearing that the conflicting claims will produce prolonged litigation. *ATTORNEY-GENERAL v. CLAVIN*..... 642

REFORMATION OF INSTRUMENTS—See **CHARTER PARTY**.

RENTS—See **MORTGAGES**, 4.

RES JUDICATA—A domestic corporation agreed to pay \$250 in its own stock for each share it acquired of the stock of an Ohio corporation, and, in addition, it agreed to pay \$106.25 for each share. The domestic corporation brought suit in the courts of Ohio against the foreign corporation and a trust company, acting on behalf of the certificate-holders, to set aside the agreements.—*Held*, that a decree of the Ohio court canceling the agreements was binding on the trust company, and was *res judicata* in a proceeding by it to establish a claim against the domestic corporation for the amount which it had agreed to pay for the stock. *STRICKLAND v. NATIONAL SALT Co.*..... 170
See **JUDGMENTS**, 4; **ORPHANS COURT**, 5.

RESTRICTIVE COVENANTS—1. A husband and wife owned adjoining lots in severalty. As a part of a sale of the husband's lot he and his wife executed an agreement reciting that one of the considerations of the conveyance was that no building should at any time be erected on the wife's lot nearer than five feet of the dividing line. The contract was originally intended to be signed by the husband alone, but the wife's name was subsequently interlined in ink as a party of the first part, though the other changes necessary to make the agreement conform to such change were not made, so that the covenants as written appeared only to bind the husband.—*Held*, that the contract, construed in accordance with the intent of the parties, was sufficient to bind the wife. *WAHL v. STOR*..... 607

RESTRICTIVE COVENANTS—Continued.**PAGE.**

2. — Where a husband and wife owned adjoining lots in severalty, and, as part of a sale of the husband's lot, the wife joined in a contract restricting the use of her lot by prohibiting an erection thereon less than five feet from the division line, her dower interest in her husband's lot constituted a sufficient consideration for her agreement, and was sufficient to bind her property by such restriction. *Id.*..... 607
3. — Where an agreement imposed a building restriction on defendant's vendor, such restriction might be enforced by injunction against defendant who took with notice, though the agreement was not recorded. *Id.*..... 607
4. — At the time defendant purchased his lot, which adjoined plaintiff's property, the vendor's husband informed him that there was a restriction on the lot covering about five feet. Defendant then asked if the restriction prevented him from building a bay-window, and was informed that it related only to the body or wall of defendant's house. Defendant took no steps to ascertain the nature of the restriction from complainant, which in fact prohibited the construction of any part of a building nearer than five feet of complainant's west line.—*Held*, that defendant was charged with notice of the restriction as it in fact existed. *Id.*..... 607
5. — Where defendant had notice of a covenant binding his lot, prohibiting the erection of a building within five feet of complainant's line, a new deed procured by defendant from his vendor for the purpose of curing an alleged mistake as to such restriction in the original deed, reciting that the restriction only restrained the erection of the main wall of defendant's building nearer than five feet from the line, was ineffective to alter the original restriction. *Id.*..... 607
See COVENANTS.

ROAD CROSSING—In a conveyance of land to a railroad company, the grantee agreed to make and maintain the necessary fences on both sides of the tract conveyed, and to provide the grantor with a suitable and convenient road crossing. At the time of the conveyance the land was farmland, and the road crossing connected the portions of the farm severed by the railroad. Fences were built with sliding bars at the road crossing, and both parties acquiesced in this arrangement for many years.—*Held*, that the crossing was a farm crossing only. *SPEER v. ERIE RAILROAD CO.*..... 411
See RAILROADS.

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SERVICE OF PROCESS—1. Service of a subpoena *ad respondendum* upon a domestic corporation, defendant in a foreclosure suit, by delivering the same, at the registered office of the company in this state, to the vice-president, also a director—*Held* to be service upon the corporation. **MARTIN v. ATLAS ESTATE Co.** 416

2. — The Chancery act (*P. L. 1902 p. 511 art. 2 § 5*) providing for the method of service of process for appearance upon the defendant does not mention corporations by name, but inasmuch as the name "person" in a statute includes corporations if they fall within the general reason and design of the act, this section of the Chancery act must be interpreted as warranting such service of process upon a corporation defendant as is equivalent to personal service upon an individual. *Id.* 416

3. — Service of a subpoena or process for appearance on any officer or agent of a corporation organized under the "Act concerning corporations (Revision of 1896)," whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in the case of a natural person. *Id.* 416

4. — Section 43a of the "Act concerning corporations (Revision of 1896)" (*P. L. 1898 p. 410*), requiring the public record of an agent "upon whom process against the corporation may be served," does not provide an exclusive method of acquiring jurisdiction over corporations in this state by the service of process for appearance upon an agent or officer, it creates an additional agent of the corporation upon whom process may—not must—be served. *Id.* 416

SPECIFIC PERFORMANCE—1. A court of equity will not decree the specific performance by vendor of a contract for the sale of land where the vendor is not the owner of the land which he has agreed to convey. Such decree will not be made even though it is within the power of vendor to purchase the land in question at a reasonable price. **PUBLIC SERVICE CORPORATION v. HACKENSACK MEADOWS Co.** 285

2. — A court of equity will not retain a bill for specific performance for the purpose of awarding damages to vendee if the bill was filed by vendee at a time when he knew that defendant was not owner of the land in question. *Id.* 285

3. — A bill for specific performance may be maintained by the assignee of the vendee in a contract for the sale of land. **BATEMAN v. RILEY.** 316

SPECIFIC PERFORMANCE—*Continued.*

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4. — In a contract for the sale of land a description of land is sufficiently definite to enable the vendee to maintain a bill for specific performance if the land is described in such a manner that it may be with certainty ascertained. Parol evidence is admissible to show that defendant owned only certain land which would answer the description contained in the contract of sale. *Id.* 316
5. — In a contract for the sale of land made by a husband, in which his wife has not joined, specific performance will not be decreed against the husband either with abatement from the purchase price or with a requirement that the husband give indemnity to the vendee against the inchoate right of dower of his wife, in a case where the wife refuses to sign the deed, unless such refusal is shown to have been induced by the husband. *Id.* 316
6. — A court of equity will not decree the specific performance by vendor of a contract for the sale of land when the vendor is not the owner of the equitable title of the land which he has agreed to convey. *FLATTAU v. LOGAN* 338
See CORPORATIONS, 1-3; VENDOR AND PURCHASER.
7. — If A, for a valuable consideration, agrees to bestow upon B a right of passage over land of A, such agreement operates to vest in B an equitable estate in the land of A co-extensive with the terms of the agreement, and it is within the exclusive jurisdiction of a court of equity to enforce the execution of the agreement by decree of specific performance, and to protect B against the violation of the agreement until the agreement shall have been executed by the delivery of the necessary assurances of legal title. *BURELL v. MIDDLETON* 774
8. — The statute of frauds will not operate as a bar to the enforcement of a parol agreement for the sale of an interest in land if the agreement has been in part performed in such manner as to render it a fraud upon the vendee to permit the vendor to avail himself of the statute to avoid his agreement, but such parol agreements are not favored, and must be clearly proved. *Id.* 774
9. — Where no adequate remedy at law exists, specific performance of a contract by defendants will be decreed on their refusal to sell tomatoes grown on certain land, as agreed, where it leaves the company helpless except to whatever extent an uncertain market may supply the deficiency. *CURTICE BROTHERS' Co. v. CATTS* 831

STATUTES CONSTRUED—

- "Account," *Gen. Stat. p. 1974 § 8* 686
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"Executors and Administrators," <i>Gen. Stat. p. 1426 § 3</i>	740
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STATUTES—1. The principle upon which subsequent legislation will operate to repeal prior legislation, without an express repealing clause, is, that where there are two acts on the same subject effect will be given to both, if possible. If the two acts are repugnant in any of their provisions, the later act operates

STATUTES—*Continued.*

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- to repeal the earlier to the extent of the repugnancy. Where two acts are not in express terms repugnant, if the later act covers the whole subject of the earlier act, and embraces new provisions, plainly showing that it was intended as a substitute for the earlier act, it will operate to repeal that act. *STATE v. VINELAND* 289
2. — The provisions of chapter 41 of the laws of 1899 (*P. L. 1899 p. 73*), authorizing the state board of health to enjoin the pollution of potable waters, held to be repugnant to and repealed by chapter 72 of the laws of 1900 (*P. L. 1900 p. 113*) in cases where the alleged pollution occurs by reason of the operation of a municipal sewer plant constructed and operated under and pursuant to the directions of the state sewerage commission appointed under the latter act. *Id.*..... 289
3. — *Semble*, chapter 41 of the laws of 1899 (*P. L. 1899 p. 73*) is wholly repealed by chapter 72 of the laws of 1900 (*P. L. 1900 p. 113*). *Id.*..... 289
4. — Legislative grants of franchises, whether granted by special charters or under general laws, confer privileges which are exclusive in their nature as against all persons upon whom similar rights have not been conferred. Any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred. *MILLVILLE GAS LIGHT CO. v. VINELAND LIGHT AND POWER CO.*..... 305
5. — Public grants are construed strictly, and in all cases of grants of franchises by the public to a private corporation, the established rule of construction is that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public. The corporation takes nothing that is not clearly given by the act. *Id.*..... 305
6. — The word "town," as used in legislative acts in New Jersey, has no fixed significance, and its use must be applied according to the manifest legislative intention as gathered from the occasion and necessity of the act. *Id.*..... 305
7. — The seventh section of the act of 1899 (*P. L. p. 536*), entitled "An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission," as amended by *P. L. 1900 p. 113*, makes it unlawful for a municipality to build or operate any plant for the treatment of sewerage from which the effluent is to flow into any of the waters of the state, except under such conditions and upon such plans as shall be approved by the commission.—*Held*, that this legislation, by necessary implication, removes such disposal plants, when constructed on plans and under conditions approved

STATUTES—*Continued.*

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by the commission, from the supervision of the state board of health, which was conferred upon that body by the act to secure the purity of the public supplies of potable waters (*P. L. 1899 p. 73*), and relieves the owners and users of such plants from the liabilities created by that act. *STATE BOARD OF HEALTH v. VINELAND*..... 862

8. — So much of the act entitled "An act to secure the purity of the public supplies of potable waters in this state" (*P. L. 1899 p. 73*), as is repugnant to the provisions of the act entitled "An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission" (*P. L. 1899 p. 536*), is repealed by the latter act. *STATE BOARD OF HEALTH v. IHNKEN*..... 865

9. — The power conferred upon the state board of health by the former of these statutes to invoke the aid of the court of chancery to restrain the discharge of waste water, from the washing of bottles and cans in a creamery and from the cleansing of its floors, into the tributary of a stream from which a municipality obtains its water-supply, is not revoked by the latter statute. *Id.* 865

STOCKHOLDERS.—1. Where a proceeding is brought by a stockholder of a corporation to have it placed under disabilities because of insolvency, whether the plaintiff is a stockholder, and so entitled to sue, may be tested in a summary manner by plea in case the suit is commenced by bill, or by answer in case it is instituted by petition. *HOOPES v. BASIC COMPANY*..... 426

2. — Where complainant transferred all his stock in defendant company to another corporation in exchange for the stock of the latter, and received back from it a single share, which he endorsed in blank and returned, such stock being transferred to him for the sole purpose of enabling him to qualify as a director in defendant company, he was not a stockholder thereof within *P. L. 1896 p. 298 ch. 185 § 65*, authorizing a stockholder of an insolvent company to sue to have the corporation placed under disabilities by injunction in respect to the exercise of its franchise and for the appointment of a receiver. *Id.*..... 426

3. — The stockholders of a going corporation who have not paid up their stock in full cannot maintain an action to compel other stockholders to pay up unpaid stock. *SIVIN v. MUTUAL MATCH Co.* 577
See CORPORATIONS, 2, 3.

4. — An existing corporation agreed to sell its property to a new corporation organized by the officers of the existing corporation, the president and vice-president being the underwriters for twenty-five thousand shares of capital stock of the new cor-

STOCKHOLDERS—Continued.**PAGE.**

- poration, being all of the stock except \$1,000 subscribed for organization purposes. The agreement gave to the stockholders of the existing corporation the prior right to subscribe for the stock of the new corporation, and stipulated for a cash installment and for the payment of the balance in installments. To what extent stockholders of the existing company had subscribed to the new stock, or whether any stockholders other than the president and vice-president had so subscribed, did not appear.—*Held*, that a dissenting stockholder could question the validity of the sale, notwithstanding the offer to sell stock, since the condition of subscription for stock in the new corporation made the stockholder liable for additional payments and required his participation in another company. *MITCHELL v. UNITED BOX BOARD, &C., Co.*..... 580
5. — A sale by a corporation of its property may be adjudged voidable as against it, at its suit or at the suit of a dissenting stockholder, by reason of constructive fraud, arising from the fact that the sale was made to its directors or to a buyer controlled by them in making the purchase, or that the sale was not at a fair price. *Id.*..... 580
6. — Where the proofs show that a dissenting stockholder, suing a corporation to restrain it from carrying out a contract for the sale of its property, may make out a case entitling him to avoid the sale on behalf of the corporation, he is entitled to such a preliminary injunction as will render a decree in favor of the corporation effective, if one should be finally made. *Id.*..... 580
7. — A minority stockholder filed a bill against his corporation, its entire board of directors and other parties, the object of which was to protect the corporation by enjoining certain contracts or transactions into which the board of directors proposed to have the corporation enter. A preliminary injunction was refused upon grounds which largely involved the whole merits of the case.—*Held* (1), that complainant was not entitled on the final hearing to bring in separate grievances of the corporation against some of the defendants only who were directors of the corporation and obtain injunctive relief with reference to such grievances with which the other defendants were not concerned, and which were not within the scope of the broad relief prayed for against all the defendants; and (2) that the complainant was not entitled, after the most of the testimony in the cause had been taken, to set up by amendment to his bill a grievance against a part only of the defendants which arose before the filing of the bill, or to set up by an addition to the bill under Rule 210a such a grievance which arose after the filing of the bill; and that (3) the decree dismissing the bill would be made without prejudice to the filing hereafter of any bill on behalf of the complainant in respect of the grievances so excluded from consideration in this case. *PIERCE v. OLD DOMINION COPPER, &C., Co.*.... 595

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8. — The owners of a number of paper mills combined and sold all of their properties to a newly-organized company, taking in exchange therefor, besides certain bonds, all of the preferred and common stock of the new company at an admitted overvaluation. The new organization was prosperous, had no debts, and earned annually large sums of money in excess of the amounts advanced to produce and sell its output. It declared a dividend on the preferred stock, payable out of such annual earnings, and some of its stockholders sought to enjoin the payment of the dividends, upon the ground that there could be no surplus or net profits until the amount of the overvaluation had been earned and the impairment of the capital stock resulting from such overvaluation extinguished.—*Held*, that as between the stockholders, no fraud being charged, the agreement to issue the stock as full paid for property purchased was binding upon the company and its shareholders, and that the stock so issued is not subject to further call, either directly or indirectly, by suppression of dividends declarable from annual net profits, and that if all of the assets for which the stock was issued still remain in the possession of the company, or, if exhausted, replaced, in kind or with money, a dividend ascertained by reserving for capital the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation. *GOODNOW v. AMERICAN WRITING PAPER Co.* 646
9. — A contract between the company and its stockholders that the stock issued to them as full paid, and not subject to further call, is, in the absence of fraud affecting other shareholders, binding upon the company and its stockholders, although subject to attack by creditors. *Id.*..... 646
10. — Persons were stockholders and not creditors of a corporation, where they received stock under a resolution in the handwriting of one of them, directing its issuance to them for advances, and retained it over four months, when they attached the certificates to their respective claims filed with the corporation's receiver; the papers in a suit by one of such persons in which the receiver was appointed reciting that they were stockholders, and not disclosing the amount of such advances as debts of the corporation, though a schedule of the corporation's debts was set out. *ISEMAN v. INTERNATIONAL STOKER Co.*... 708
- SURETYSHIP—1. A surety is not required to surrender any security given him against loss until his liability to pay is ended. *SMITH v. WIGLER*..... 559
2. — The burden is on a surety, in a suit to compel him to reassign a mortgage assigned to him as indemnity, to show that the mortgage was intended to secure him as surety, not only on a bail bond then executed, but on others that it might be necessary to give in the proceedings. *Id.*..... 559

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3. — Evidence in a suit against a surety to compel him to reassign a mortgage assigned to him as indemnity considered and *held* that complainant was entitled to a decree directing a re-assignemnt. *Id.*..... 559

SURVEY—See GENERAL PROPRIETORS OF EASTERN DIVISION OF NEW JERSEY.

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TAX TITLE—Mortgages were made to H. L., who was president of a national bank, to secure moneys due to that bank. H. L. filed a bill to foreclose them, and did not make the bank a party thereto. A decree of foreclosure followed, and upon the *fiery facias* thereon issued the sheriff exposed the mortgaged premises to sale, and the complainant in this cause bought three of the mortgaged tracts. These tracts had been sold for taxes, and certificates of sale had been issued which the bank had acquired by assignment, and was proceeding to obtain declarations of sale thereon. On bill to enjoin the bank from enforcing the certificates—*Held*, (1) that the mere fact that the bank had not been made a party to the foreclosure exhibits no equity to sustain the relief sought; (2) if the bank (if made a party to the foreclosure) would have been compelled to bring in its claim under the tax sales, to be enforced with the mortgage debt, an equity might arise thereon, but as the bank acquired its claim, not by redemption under notice from the purchasers, but by an assignment of the rights of the purchasers, which gave a prior lien on the lands, it would not have been compelled to bring them into the foreclosure; (3) the claim that a solicitor of this court, attending for the bank at the foreclosure sale, made representations to the complainant in this cause before he purchased which estopped the bank from enforcing against him the rights it acquired by the assignments of the certificates of sale is not made out by proofs. **BUSHEY v. NATIONAL STATE BANK OF CAMDEN**..... 467
See PARTITION, 1.

- TELEGRAPH AND TELEPHONE LINES—**1. The right of a corporation to take and hold title to an interest in real estate cannot be denied by the grantor, but can only be contested by the public authorities. **NORTHEASTERN TELEPHONE AND TELEGRAPH CO. v. HEPBURN**..... 7
2. — The grant of a right to maintain a telephone line over certain premises conferred on the grantee the right to construct a single line of poles, and to place thereon any number of cross-arms and wires. *Id.*..... 7
3. — A deed to a water company granted a right of way over the grantor's land for the laying of water pipes within a space not exceeding ninety-nine feet wide, "with the right to set up,

TELEGRAPH AND TELEPHONE LINES—*Continued.* PAGE.

operate and maintain a telegraph or telephone line or lines thereon, and with the right of ingress and egress to and from said right of way for all purposes."—*Held*, that such grant did not confine the water company to a telegraph or telephone line used exclusively for the purposes of its water works plant, but entitled a telephone company, under an assignment from the water company, to use such right of way for the maintenance of a commercial telephone line. *Id.*..... 7

4. — Where defendants granted a right of way for the maintenance of a telephone line to complainant's assignor, and thereafter defendants contended that complainant company had increased the burden of the easement beyond the scope of the original grant, and thereupon entered and cut down certain of the wires from the poles, &c., complainant was not required to establish its right to maintain its line in the condition that existed before defendants' acts complained of in order to entitle complainant to an injunction restraining further interference with its wires. *Id.*..... 7

5. — Where a deed to a right of way for a telephone line was unambiguous, parcel evidence was inadmissible to limit it to a grant for the maintenance of a non-commercial line. *Id.*..... 7

6. — Where plaintiff was a *bona fide* assignee of a right of way for the maintenance of a telephone line, it was not bound by an alleged oral agreement between the original parties to the deed conveying such right of way that the line should be used only for the benefit of the grantee in connection with its water works plant. *Id.*..... 7

TERRITORY AND JURISDICTION—The agreement of 1833, between the commissioners representing the States of New Jersey and New York, fixing the boundaries between such states, article 2, provides that the State of New York shall retain its present jurisdiction of and over the islands lying in the waters of the bay of New York.—*Held*, that such agreement did not deprive the State of New Jersey of that element of state sovereignty which permits the determination of the status and ownership of lands within the state limits, and hence the court of chancery has jurisdiction to enforce its decree of foreclosure of mortgage and sale of islands in the harbor of New York, but within the New Jersey boundary. *COOK v. WEIGLEY.*..... 221

TITLE—*See* GENERAL PROPRIETORS OF EASTERN DIVISION OF NEW JERSEY; PARTITION, 1; TAX TITLE.

TOWNSHIPS—1. A township may, by bill in equity, prevent the use of its highways by a gas company which is engaged in the act of laying gas pipes in such highways without legislative authority. *TOWNSHIP OF LANDIS v. MILLVILLE GAS LIGHT CO.*..... 347

TOWNSHIPS—Continued.**PAGE.**

2. — The relief granted to the township in such case may also prevent the use of the gas pipe already wrongfully laid in the highways of the township, when the pipe so laid has not been connected with buildings or brought into use. *Id.*..... 347
3. — The propriety of a resolution of a township committee authorizing the filing of a bill to restrain the use of its highways is a legislative and not a judicial question, and the exercise of such legislative discretion by the township committee will not be interfered with by this court in the absence of manifest fraud. *Id.* 347
4. — Defendant company held to be without legislative authority to occupy the highways of complainant township for the purpose of laying gas pipes therein. *Id.*..... 347

TRADE MARKS AND TRADE NAMES—1. A manufacturer of rubber goods who uses the word "Eureka," misleads the public, and gains an unmerited advantage from the trade reputation given to such word by another company which used such word in its corporate name, will be restrained from the use thereof, not only in its corporate title, and in connection with competitive goods, but also in connection with non-competitive goods manufactured by it, so long as it continues to manufacture any goods in competition with the company first using the word. **EUREKA FIRE HOSE CO. v. EUREKA RUBBER MFG. CO.**..... 555

2. — The proprietor of a hotel managed as "The Hotel Dominion" is entitled to restrain another from operating a new hotel under the name of "The New Dominion," as against the objection that the owner of the new hotel as tenant of the old improved its reputation by reason of his labors. **O'GRADY v. McDONALD** 805
3. — The proprietor of a hotel managed as "The Hotel Dominion" is entitled to an injunction restraining the use by another proprietor of a hotel of the name "The New Dominion," on the ground that the name of the new hotel will aid in procuring guests theretofore patronizing the old one. *Id.*..... 805
4. — The bill of complaint exhibited by the Bear Lithia Springs Company against the Great Bear Spring Company to enjoin the latter from using the word "Bear" or the picture of the animal of that name in connection with its sale of natural water is dismissed, for the reason that the defendant is not shown to have practiced any simulation of the complainant's title or trade mark, whereas the complainant itself has, by its own acts, created in great part the very confusion of which it complains. **BEAR LITHIA SPRINGS CO. v. GREAT BEAR SPRING CO.**..... 871

TRADE MARKS AND TRADE NAMES—*Continued.* PAGE.

5. — Assuming that everyone has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, he may not, in such use of his name, resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *INTERNATIONAL SILVER CO. v. ROGERS*..... 933
6. — Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, is an artifice calculated to produce the confusion alluded to. *Id.*..... 933
7. — While a personal name may not constitute a technical trade mark, yet where an article has come to be known by that personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. If he uses his own name, it must be so used as not to deprive others of their rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact. *Id.*..... 933
8. — Where a man's conduct has been such that he cannot engage in a particular business, even in his own name, without profiting by his prior fraud, to the detriment of another's trade, he must so distinguish his name as to avoid confusion. The words "Not connected with any other of the same name," or words of similar import, do not suffice. *Id.*..... 933

TRADE SECRETS—1. The complainant purchased from a concern in Holland a process for the successful detinning of tin scrap which was unknown in this country, the secret of which is zealously guarded. After the success of the process had been demonstrated, one of the complainant's original directors, charged as such with the duty of secrecy, and who moreover held in individual trust for the complainant a copy of the formula of its process, became the president of the defendant corporation, and, with the assistance of certain discharged employes of the complainant, installed for the defendant corporation, as a competitor of the complainant, the process so purchased by the latter. Upon a bill filed to enjoin this inequitable competition, and to restrain the further publication of the complainant's process—*Held*, (1) that the quondam director of the complainant should be enjoined because of his breach of trust; (2) that the defendant corporation should be enjoined because the knowledge of its president

TRADE SECRETS—Continued.

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was imputable to it; (3) that the discharged employes of the complainant should be enjoined under the rule laid down in this court in the case of *Stone v. Goss*, 65 N. J. Eq. (20 Dick.) 756. Held, also, that, assuming that the complainant had not acquired a title to its process that was good as against the discoverer thereof, and also that the process itself was not absolutely a secret one, the complainant, upon general principles of equity, is entitled as against its wrong-doing trustee, and others chargeable with notice, to protect the qualified secrecy of such process that arose from such relation of trust and confidence. *VULCAN DETINNING CO. v. AMERICAN CAN CO.*..... 388

2. — The knowledge of an agent, casually obtained, is chargeable to a principal by whom he is afterward employed whenever the principal, if acting himself, or (if a corporation) when acting through some other agent, would in the natural course of events have acquired the knowledge or have been put upon such inquiry as was equivalent of notice. *Id.*..... 388

3. — The case of *State v. Sooy*, 41 N. J. Law (12 Vr.) 394, approved and applied. The case of *Willard v. Denise*, 50 N. J. Eq. (5 Dick.) 483, overruled. *Id.*..... 388

4. — Complainant purchased certain land with his own money, but caused it to be conveyed to his wife to prevent his children by a former marriage from obtaining the same at his death. On the death of the wife he sued to establish a trust in the same, and that if one died the other would get the property.—Held, that the evidence was insufficient to rebut the presumption that the wife took the property by irrevocable gift. *LIPP v. FIELDER.*..... 439

TRUSTS AND TRUSTEES—1. The liability to make good a loss resulting from a breach of trust participated in by more than one trustee is both joint and several, so that each trustee is liable for the whole loss. *PROPRIETORS, &C., N. J. v. FORCE.*.... 56

2. — To enable this court to decree a resulting trust to grantor, where an absolute deed of conveyance reciting a pecuniary consideration is executed and delivered, the intention that the grantee is not to enjoy the beneficial estate, but that a trust is to result, must appear expressly or by implication from the terms of the deed, and no extrinsic evidence of grantor's intention is admissible unless fraud or mistake is averred. *HOLTON v. HOLTON* 313

3. — The fact that a conveyance was from a father to his daughter and that the father retained possession of the property conveyed and received its revenues and made improvements, standing alone, and without any averment of fraud or mistake through undue influence, or want of appreciation upon the part of the grantor as to what he was doing, or that the grantor was with-

TRUSTS AND TRUSTEES—*Continued.*

PAGE.

- out ample means to warrant a gift, or was without the benefit of disinterested and competent advice, or entertained a purpose contrary to that expressed in the deed, is not sufficient to raise the presumption of a constructive trust and to cast upon the grantee the burden of answering. *Id.*..... 313
4. — If a trustee purchase a title that cures or completes one that he holds in trust, the presumption in equity will be that the later purchase was made in aid of the former trust. *VULCAN DETINING CO. v. AMERICAN CAN CO.*..... 388
5. — Where a testator bequeathed stocks and bonds, which passed into the possession of the executors and trustees of his will, the executors and trustees, if continuing to hold the same in the exercise of good faith, will be protected from any losses by virtue of *P. L. p. 236*, providing that, when bonds and stocks come into the hands of executors or trustees under the will of a testator owning them, they shall not be accountable for any loss by reason of continuing to hold them, provided they exercise good faith and reasonable discretion. *BROWN v. BROWN*..... 667
6. — Where a testator vested his executors and trustees with power to invest in improved and productive real estate, or in sound, productive securities, as they might deem best, the executors were not exonerated on investing money in stocks which depreciated and thereby caused a loss to the estate, as the authority conferred did not merely bind them to the exercise of good faith and reasonable judgment. *Id.*..... 667
7. — Where executors empowered to sell real estate of the testator employ real estate agents to procure purchasers of real estate, the commissions paid to such agents are payable out of the principal of the estate, and not out of the income. *Id.*..... 667
See BANKRUPTCY, JURISDICTION, 9, 11.
8. — An agent of an insurance company collected insurance money under a power of attorney from the beneficiary and deposited it with a third person, who refused to deliver it to the beneficiary unless the beneficiary would give him one-half thereof to pay to the agent pursuant to an alleged agreement between the beneficiary and the agent.—*Held*, that the beneficiary could bring an equitable action against the agent and the third person to impress the money in the third person's hands with a trust in favor of the beneficiary, and after adjustment to compel the payment of the money to the complainant. *MAZZOLLA v. WILKIE* 722
9. — Evidence *held* insufficient to justify a finding that defendant purchased certain real estate in her own name under an agreement to hold the same in trust for herself and complainants, her minor children. *TUITE v. TUITE*..... 740

TRUSTS AND TRUSTEES—*Continued.*

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10. — A trust declaration and assignment, by which C. transferred all his property to a trustee, provided that the trustee should pay the interest on outstanding notes, bonds, mortgages, &c., given or endorsed by C., and from time to time reduce and cancel the same, and hold and retain without action, and without collecting interest thereon, all notes and securities given by C., or by his son, daughter and son-in-law, until the death of C., and then to cancel them.—*Held*, that a mortgage by the son-in-law, a bond of the daughter, and notes of the son, endorsed by C., were to be canceled at his death, and the trustee should be credited with the sum expended in the payment of the same. *BABBITT v. FIDELITY TRUST Co.*..... 745
11. — Under this trust declaration and assignment, where a note was not made before the making of the declaration of trust, and was not a renewal of any note or notes existing at the time of the execution of the trust, the trustee was not warranted in paying it from the estate. *Id.*..... 745
12. — Where real estate was transferred to a trustee to hold or convey the same as he thought best, items paid real estate agents and others as commissions on sales of real estate, which were shown to be reasonable commissions for the services rendered, were properly charged against the trust estate. *Id.*..... 745
13. — Where a party transferred all his property to a trustee, it was proper for the trustee to pay for the services of the lawyers engaged in making the transfers and the declaration of trust and in giving advice concerning the proper way to accomplish the object of the settlor. *Id.*..... 745
14. — A settlor, at the time of making a declaration of trust, owned and transferred to a trustee shares of stock in an insurance company. The execution of a scheme whereby the trustee attempted to obtain a majority of the stock of the insurance company was prevented by the court, and the stock of the insurance company depreciated in value so that the stock of the trust estate sold after the defeat of the scheme brought much less than that sold before.—*Held*, that it could not be said that the trustee should have known that the necessary result of the proposed scheme would be to depress the price of the stock of the insurance company, and he should not be surcharged with the difference between the selling price of the stock before the defeat of the scheme and the lower price at which it subsequently sold. *Id.*, 745
15. — Where a person transferred all his property to a trustee to hold as a trust fund, it was a general trust, and if the trustee held stock which came to him from the settlor, and which were not securities he was authorized by law to hold, he should be surcharged with the difference between the market value of the

TRUSTS AND TRUSTEES—*Continued.*

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- stock at the time he should have sold it and the lower price at which it subsequently sold. *Id.*..... 745
16. — Where a declaration of trust declared that the trustee hold the property transferred in trust for the following uses and purposes, "to hold or convey the same as in his judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time," the trustee was to exercise his discretion only in doing authorized things, and could not hold securities transferred to him which he was not by law authorized to hold. *Id.*..... 745
17. — Where a trustee's conduct was not willfully wrong, and he has not confused accounts or unwarrantably used trust moneys, and has large resources, so that the making of unauthorized investments could not prejudice the interest of the *cestui que trust*, the fact that he was subject to surcharge in certain respects is insufficient to defeat his right to commissions. *Id.*..... 745
18. — Where a trustee was held to a strict accountability, had charge of a large estate of a most varied character, was required to exercise due diligence in the calling in of all unauthorized investments, and had duties and responsibilities not incident to the care of an ordinary trust estate, four per cent. upon the principal was a proper allowance for his compensation. *Id.*... 745
19. — The rule that if a trustee, or one standing in a similar capacity, becomes a purchaser of the trust property, such act is voidable at the instance of the person whom he represents, applies to a sale of partnership property by a master, pursuant to a decree in partition, and where the same is purchased by one of the partners the other partner may avoid the sale. *CRESSE v. LOPER* 784

U.

UNFAIR COMPETITION—*See* TRADE MARKS AND TRADE NAMES.

V.

- VENDOR AND PURCHASER—1. An agreement by a husband to convey free of all encumbrance is not satisfied by a mere conveyance containing a covenant against encumbrance, but the vendee is entitled to a conveyance by the husband and his wife before paying the purchase-money, the existence of the wife's inchoate right of dower constituting a breach of covenant against encumbrances. *SALDUTTI v. FLYNN.*..... 157
2. — A vendor is in equity a trustee for the vendee from the time of execution of agreement to convey, and failure of the vendee

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- to perform the contract strictly at the time fixed, if the vendor is ready to perform, does not in equity discharge the contract, unless time is of the essence of the contract or the delay has made specific performance inequitable. Hence a vendor agreeing to convey free of all encumbrance is not released from the contract by the refusal of the vendee to accept a deed in which the vendor's wife did not join. *Id.*..... 157
3. — Where a vendor agreed to convey free of all encumbrance, but merely tendered a deed in which the wife did not join, grantees in a deed executed and acknowledged by such vendor and his wife, who had notice of such agreement, of the tender of such deed and of the vendee's refusal to accept, so far as the vendor is concerned, hold the legal title as trustees for the vendee and subject to the agreement. *Id.*..... 157
4. — Such deed passed the lands to the grantees free of the vendor's wife's inchoate right of dower, and a conveyance by such grantees to such vendee would pass a title to him free from such dower right. *Id.*..... 157
5. — Where a vendor and wife sign an agreement to convey lands free of all encumbrance, but the agreement was not acknowledged by the wife, as required by the statute (*P. L. 1898 p. 685 § 39*), the wife was not bound, and the vendee cannot compel her, to convey her interest, and she is entitled to bargain for the sale of her inchoate right of dower as her own property. *Id.*... 157
6. — Where a vendor and his wife conveyed the land to certain grantees who had knowledge of the agreement, and of the vendee's refusal to accept a deed in which the wife did not join, in a suit by the vendee against the vendor and his wife and the grantees for specific performance, the vendee must, as a condition precedent, pay the grantees the value of the wife's inchoate right of dower. *Id.*..... 157
7. — It appearing in such case that the grantees had not paid the wife the value of her inchoate right of dower, the amount should be paid to her, but on the condition that she release the grantees from any further claim to recovery under the agreement. *Id.*..... 157
8. — In such case, on the refusal of the wife to execute such release, the payment should be made to the grantees, leaving the wife to her remedy at law against them. *Id.*..... 157
9. — The vendee, on payment of such value, is entitled to a reduction thereof from the purchase price payable to the vendor, the grantees are entitled to receive the amount paid the vendor on account out of the purchase-money, and, on the execution of a deed by the grantees to the vendee, the vendor is entitled to receive the balance due him. *Id.*..... 157

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10. — There is no legal objection to an absolute conveyance of land and a simultaneous agreement by vendee to reconvey the land to vendor upon terms agreed upon. But equity is privileged to inquire beneath the external forms and to ascertain whether or not, in view of all the circumstances disclosed, the transaction was an absolute sale, or whether the conveyance was in fact intended as a security for the payment of the money specified in the agreement for reconveyance. *JEFFREYS v. CHARLTON*. . . . 341

11. — In the determination of the intention of the parties in such transactions, the fact that no obligation existed upon the part of vendor to pay the amount fixed as the price for reconveyance, is almost wholly inconsistent with the idea that the transaction was intended as a mortgage security. The fact that the amount paid by vendee was practically the entire value of the property is also inconsistent with the idea that a mortgage security was intended. *Id.* 341

12. — Where, in such case, the agreement for reconveyance was in form and intent an option agreement wherein vendee extended to vendor the option to purchase within a specified time upon specified terms, such option must be complied with by the payment or tender of payment of the amount specified within the time named, or all rights under the option will be lost. *Id.* 341

13. — The fact that the conveyance was made by vendor at a time when the property was about to be sold under process of execution, and that the conveyance was made with a view that vendee should purchase the property at the approaching judicial sale at a price named and should extend to vendor the option of repurchase at that price, in no way enlarges the rights of vendor, where it appears from all the circumstances of the case that the transaction was intended by the parties as a sale and an option of repurchase, and not as a security for the repayment of the expenditures to be made by the vendee. *Id.* 341

14. — Where, in a suit by the vendee in a contract for the sale of land for specific performance, it appeared that after the time when conveyance should have been made defendant had leased the premises, on which there were buildings belonging to complainant, and which he had placed there under a lease, and that defendant had rented the real estate and buildings for a sum amounting to merely the value of the ground rent without regard to the building, on a decree for complainant, defendant should be charged, not only with such ground rent, but with the reasonable additional value of the rent of the buildings. *NAUGHTON v. ELLIOTT* 564

15. — The fact that, on an application to restrain defendant from collecting the rents and for a receiver, by consent of all parties an order was made authorizing defendant to collect the rent

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until disposition of the litigation, did not sustain a contention that defendant had been in charge of the premises as a receiver for a certain period, and that during such period he should not be charged with more rent than he actually received. <i>Id.</i>	564
VITAL STATISTICS—See CANCELLATION OF INSTRUMENTS.	

W.

WAYS—See ROAD CROSSING ; TELEGRAPH AND TELEPHONE LINES.

- WILLS—1.** In the absence of any clause or expression in a will showing an intent to the contrary, a devise or bequest from a wife to a husband "to him and his heirs forever," lapses upon the death of the husband in the lifetime of the testatrix; the words "heirs forever" being words of limitation and not of substitution. *McKIERNAN v. BEARDSLEE*..... 283
- 2.** — The transcript of the proceedings in the orphans court shows that the will offered for probate had been revoked by a subsequent will having variant provisions, and also containing an express revocation of former wills, and that the subsequent will had been burned by the testator with intent to revoke it.—*Held*, upon authority of the decision in this court in *Randall v. Beatty*, 31 N. J. Eq. (4 Stew.) 643, that the revocation of the subsequent will did not revive the former will, in the absence of circumstances indicating that such was the intent of testator. *Held further*, that the circumstances proven raised no inference that testator intended to revive the former will, but such intent was negatived by the proofs, and therefore that the will offered for probate was properly rejected. *MOORE'S CASE*..... 371
- 3.** — A testatrix, after appointing an executor, directed the payment of her debts, and then blended her real and personal estate, giving to four children each one-sixth; to another child, one-sixth, less \$800, charged as an advancement, and the remainder to the executor in trust for another child.—*Held*, that the executor had authority to convey real estate, since to make the division and establish the trust a sale of the real estate was necessary. *WOOD v. LEMBCKE*..... 651
See DEATH, 2.
- 4.** — The court will not, in advance, advise executors authorized to compromise debts due to the testator how they shall exercise the power, but they must, at their peril, exercise their own judgment with respect thereto. *BROWN v. BROWN*..... 667

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5. — Where a testator declared that no advancements should be charged against his children unless advances or charges should be made on his books against his children, a charge against a son, found on the books, must be treated as an advancement. *Id.* . . . 667

6. — Where a testator set aside a certain sum for his wife for life, and provided that on her death two-tenths were to be paid to a son, and directed that two-tenths of the residue of his estate should be held in trust for the son for life, and, on his death, to his issue surviving, and the son was indebted to the testator, the son's indebtedness must be charged against the bequests made to him. *Id.* . . . 667

7. — A testator provided that advances made to his children should not be considered unless the advances should be made on his books. On the books of the testator appeared a charge against a son, followed by the statement that same should not bear interest.—*Held*, that the indebtedness due to the estate from the son did not draw interest. *Id.* . . . 667

8. — A testator directed that of the residue of his estate one-tenth should go to his daughter, and that the executors, on the written request of the daughter, should set apart to her the residence of the testator, on request therefor prior to the sale thereof, at a specified sum. The executors made a partial distribution of the estate, and set aside personalty to the daughter. Subsequently she requested the executors to set aside for her the premises mentioned.—*Held*, that if the daughter returned to the estate the personalty set aside to her, and the executors gave her the premises, no one could complain. *Id.* . . . 667

9. — A will authorizing the testator's daughter by her will "to dispose of" a fund "to and among" his grandchildren "in such shares and in such manner as she shall think right and proper," gave her a non-exclusive power of appointment, and hence the provision of her will, excluding two grandchildren in a *per capita* distribution of the fund, was invalid. *CAMERON v. CROWLEY* . . . 682

10. Where lands are devised in the first instance in language indeterminate as to the quality of the estate, from which an estate for life would result by implication, and words adapted to the creation of a power of disposal, without reservation as to mode of execution, are added, the will vests in the devisee an estate in fee. *WILLS v. WILLS* . . . 782

11. — A power given to a devisee to sell when in her judgment a sale is necessary for her comfort and convenience, is a power without limitation within the rule that where lands are devised in the first instance by language indeterminate as to the quality

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- of the estate, and words adapted to the creation of a power of disposal, without reservation, are added, the will vests in the devisee an estate in fee. *Id.*..... 782
12. — While force should be given to the intention of the testator, his intention must be gathered by the application of the known rules of construction and interpretation. *Id.*..... 782
13. — The provision in a will, "I do hereby will and bequeath unto * * * all my real estate and personal property not disposed of in some other way," carries the legal title to the real estate referred to, since the word "bequeath," when expressly applied to real estate, is equivalent to the word "devise," and under 3 Gen. Stat. p. 3763 § 35, words of inheritance are made unnecessary. *CENTENARY FUND v. LAKE.*..... 808
14. — Where an absolute power of sale is given in a will, no condition subsequent or limitation in trust can be held operative against a title emanating under a proper exercise of the power, since the power of sale *ex proprio vigore* subordinates the condition. *Id.*..... 808
15. — A will construed and held not to give to the testator's son, as life tenant, by implication, the rents of a certain tract of land. *VREELAND'S CASE.*..... 851
16. — The *prima facie* effect of a perfect attestation clause appended to a paper propounded for probate as a will may be overcome by evidence. *MANNER'S CASE.*..... 854
17. — By the testimony of the attesting witnesses, it appeared that the paper was not signed by the alleged testatrix in their presence; that when they entered the room where she was, the scrivener who had drawn the paper said in an audible voice that she had made her will and wanted them to witness it, and added "this is her name;" that the alleged testatrix was silent and made no sign of assent to either of the scrivener's statements.—*Held*, that there was no sufficient proof of publication of the paper as a will or of an acknowledgment of the making of the signature thereto by the alleged testatrix to satisfy the requirement of the statute. *Id.*..... 854

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